

The Effect of Government Shutdown on Government Contracts

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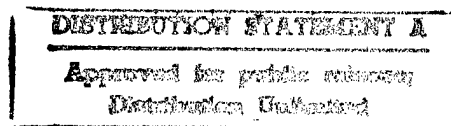
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The Effect of Government Shutdown on Government Contracts

Chapter I. Introduction

The possibility of a government shutdown in fiscal year 1996 began to be discussed months before it actually occurred.¹ Testifying before Congress, Office of Management and Budget Director Alice M. Rivlin, predicted that the “threatened shutdown would be very disruptive and result in a general loss of productivity among the federal work force to include tasks being left undone during the shutdown, and work piled up afterward.”² To varying degrees, the prediction proved to be true. President Clinton, referring to the curtailed government services resulting from the shutdowns, called the shutdowns an “unnatural disaster”³ which created a significant back-log of work. In fact, letters and packages for 13 closed federal agencies were stored in tractor trailers, to be delivered the first day after the shutdown ended.⁴ Personnel and payroll offices spent thousands of hours resolving furlough-related problems, while newspapers reported that the

¹ Federal Shutdown Advisory issued by Alice M. Rivlin, Director, Office of Management and Budget (Jul. 26, 1995).

² *Testimony of Alice M. Rivlin, Director, Office of Management and Budget : Joint Hearings Before the Senate Budget Comm. and the House Budget Comm.*, 104th Cong., 1st Sess. (1995).

³ President William Clinton, Remarks at White House Concerning the Government Shutdown (Jan. 3, 1996).

⁴ Stephen Barr and Dan Morgan, *Measures Leave Questions Unanswered*, Wash. Post, Jan. 7, 1996 at A5.

General Accounting Office could easily wind up dealing with furlough related matters into the next century.⁵

It is not unusual for Congress to fail to pass a budget prior to the beginning of a fiscal year. Nor is it unusual to have multiple continuing resolutions, or gaps in funding, in any one year. What made the shutdowns of fiscal year 1996 so different was the length of the funding gaps, their impact on the federal government, and their effect on government contracts.

Without question, the shutdowns of fiscal year 1996 were unprecedented in length and scope. The first shutdown, which began on 14 November 1995 furloughed an estimated 800,000 federal employees, and ended on 19 November 1995. The second, and longest shutdown in United States history, began on 16 December 1995 and furloughed an estimated 284,000 federal employees. Approximately one million federal employees, classified as "essential," were required to continue working, despite the shutdown, in a "non-pay" status.⁶ The second shutdown ended on 6 January 1996 when the President and Congress agreed to fund the government through January 26, 1996.

The impasse between the Administration and the Republican-controlled Congress over passage of either permanent appropriations bills or a continuing resolution set in motion both shutdowns. An appropriations impasse of this sort leads to the lack of budget authority to fund federal agencies and, together with the lack of agreement on a continuing resolution to act as a stop-gap funding measure, a portion of the federal

⁵ Mike Causey, *The Malady Lingers On*, Wash. Post, Jan. 2, 1996 at A7.

government is forced to shut down. The key catalyst for a federal shutdown is the government's reluctance to violate the Anti-Deficiency Act.⁷ As discussed later, this collection of statutes prohibits agencies from spending money not otherwise authorized by law.

Use of the term "shutdown" to describe a funding gap is a bit of a misnomer. Despite the fact that there may be no signed appropriation or continuing resolution, many parts of the federal government continue to operate. This is discussed in greater detail in Chapter IV. In addition, a large number of federal employees are often classified as "essential" or "excepted." These employees are expected to continue to report to work despite a shutdown to carry on the essential functions of the government. Finally, many expenditures occur under multiple year appropriations, or revolving funds, that do not lapse with the expiration of any particular fiscal year.⁸

Overall, the impact of the government shutdown of fiscal year 1996 was far reaching, and expensive⁹, but of little real significance. Without a doubt, each shutdown will continue to generate an enormous amount of media attention; it's not an everyday occurrence. In addition, some government agencies, programs and contractors are bound to be inconvenienced by each shutdown due to the "unusual situation."

⁶ American Federation of Government Employees v. Rivlin, Civ. A. No. 95-2115, WL, (D.D.C. 1995).

⁷ 31 U.S.C. §§ 1341, 1342, 1517 (1983).

⁸ *Testimony of Walter Delinger, Assistant Attorney General, Office of Legal Counsel, Before the Senate Comm. and House Comm., 104th Cong., 1st Sess. (1995) (U.S. Dep't of Justice).*

However, with each shutdown, essential governmental functions will continue, the government will ultimately pay contractor's reasonable claims, "essential" or "excepted" government employees will be paid, and furloughed federal employees are likely to continue to receive backpay,. This thesis will focus on the shutdown's impact and effect on government contracts.

⁹ *Clinton Blames GOP for Costly Federal Shutdowns*, Wash. Post, Jan. 21, 1996 at A18 (Cost of both shutdowns of fiscal year 96 was estimated at over \$1.5 billion dollars).

Chapter II. Economic Impact of Shutdown

Federal shutdowns prior to fiscal year 1996 were generally of short duration, and had relatively little affect on the government or federal contractors. Conversely the fiscal year 1996 shutdowns caused economic hardship and disruptions in the federal workplace and the private sector. During the current shutdown, news services regularly aired stories detailing the adverse consequences experienced by federal employees and government contractors alike. Both groups had to contend with delayed paychecks and disruption of normal services. In some cases, contractors were ordered to stop work and employees were furloughed.

The costs of shutting down, during a lapse in appropriations, varies in proportion to the length of the shutdown, the number of agencies and federal workers involved, and legitimate contractor costs that can be attributed to the shutdown. Some of the costs, such as retroactive pay for furloughed federal workers, are easily identifiable, while other costs, such as the effect on morale (and associated uncertainty) and reduced productivity, are harder to quantify. Another cost that's difficult to measure relates to contractor losses and claims for equitable adjustments.

A. Cost to the Government

Difficulties in computing the cost of a federal shutdown have been a recurring problem. The Government Accounting Office (GAO) was unable to accurately evaluate government-wide costs for shutdowns in October 1979 because of incomplete responses

from agencies.¹⁰ In 1986, the Office of Management and Budget (OMB) Public Affairs Director, Edwin Dale, referring to the estimated payroll cost of \$28 million for furloughing 556,000 federal workers stated, "There has never been an accurate figure for the cost of these things, and there never will be."¹¹ In 1991, GAO encountered similar difficulties in estimating the cost of the federal government shutdown over the 1991 Columbus Day Holiday weekend. The report noted that much of the costs, such as lost productivity and adverse affects of poor employee morale, were intangible and widespread throughout the agencies.¹²

Nonetheless, many experts have attempted to provide an educated guess. Testifying at a congressional hearing on the November 1995 federal shutdown, Dr. Walter Broadnax, Deputy Secretary of the Department of Health and Human Services stated that, "It is extremely difficult to determine a reliable cost estimate." This is particularly true when one factors in "non-personnel costs and employee morale."¹³ Estimated costs of the November 1995 shutdown, provided by Mr. John Koskinen, Deputy Director for Management, OMB, range from \$700 to \$750 million, with approximately \$400 to \$450

¹⁰ General Accounting Office. *Funding Gaps Jeopardize Federal Government Operations*. (U.S. Government Printing Office, Mar. 3, 1981).

¹¹ *Shutdown Not a Cash Cost*, Wash. Post, Nov. 30, 1986 at A25.

¹² General Accounting Office. *Government Shutdowns: Data on Effects of 1990 Columbus Day Weekend Funding Lapse*. (U.S. Government Printing Office, Oct. 1990).

¹³ *Government Shutdown: What's Essential?: Hearings Before the Comm. on Government Reform and Oversight, 104th Cong., 1st Sess. (1995)* [hereinafter *What's Essential?*] (Statement of Dr. Walter Broadnax, Deputy Secretary, Dep't of Health and Human Services).

million being payroll costs for furloughed employees.¹⁴ OMB estimated the cost for both fiscal year 1996 shutdowns, including back pay for furloughed employees and lost revenue and inefficiencies caused by the stopping and starting of programs, at more than \$1.2 billion.¹⁵ President Clinton, in his radio broadcast to the Nation on Saturday, January 20, 1996, reported the combined cost of both shutdowns at \$1.5 billion.¹⁶

The shutdowns of fiscal year 1996 did not affect all government agencies the same. Those agencies and departments whose fiscal year 1996 appropriations had been approved prior to the shutdown, or which did not have to depend on annual appropriations to fund ongoing contracts, were inconvenienced. Conversely, those agencies whose appropriations had not been approved were required to consider how they would deal with the shutdown. The uncertainty did disrupt normal government operations.¹⁷ Due to the length of the shutdowns, and their occurrence during the year end holiday season, many furloughed government employees experienced the twin stress of heightened expenditures and reduced, or delayed, paychecks. Employee morale and the once stable image of federal employment were tarnished.¹⁸ Morale was further weakened by the labeling of furloughed federal employees as "non-essential."

¹⁴ *What's Essential?* *supra* note 13, (Statement of John A. Koskinen, Deputy Director for Management, Office of Management and Budget).

¹⁵ Stephen Barr and Dan Morgan, *Measures Leave Questions Unanswered*, Wash. Post, Jan. 7, 1996, at A10.

¹⁶ *Supra* note 9.

¹⁷ Peter Behr, *Contractor Face Mounting Costs From Government Shutdowns*, Wash. Post, Jan. 23, 1996, at C1 (as reported by the Federal Procurement Data Center (1996).

¹⁸ Stephen Barr, *Workers Worry Over the Fate of Once-Secure Jobs*, Wash. Post, Dec. 24, 1995, at A1.

George Munoz, Assistant Secretary for Management, Department of the Treasury said, "Labeling furloughed government employees as 'non-essential' was wrong. It mistakenly convey(s) a sense of relative importance among federal employees, and perpetuates the false impression that some federal workers perform jobs that are trivial or unnecessary."¹⁹

Federal services relating to health, welfare, law enforcement, financial services, veterans affairs, parks and museums, visa-passports, and many others were adversely affected by the shutdowns. For example: hot line calls to the National Institute of Health concerning diseases went unanswered;²⁰ toxic waste clean-up at 609 sites stopped, sending 2,400 "Superfund" workers home,²¹ and placing 10,000 private sector employees out of work;²² eleven states and the District of Columbia temporarily suspended unemployment assistance for lack of federal funds;²³ the Department of Justice suspended work on more than 3,500 bankruptcy cases;²⁴ federal and state funded child-support recovery programs were suspended;²⁵ thousands of visas and passport

¹⁹ *What's Essential?* *supra* note 13, (Statement of George Munoz, Assistant Secretary for Management, Dep't of the Treasury).

²⁰ *What's Essential?* *supra* note 13.

²¹ Stephen Barr and Frank Swoboda, *Jobless Aid, Toxic Waste Cleanup Halt*, Wash. Post, Jan. 3, 1996, at A1.

²² Stephen Barr, *Shutdown Creates Vacuum in Areas Far Beyond the Beltway*, Wash. Post, Dec. 29, 1995, at A7.

²³ Thomas Lippman, *Inconvenience Edges Toward Emergency*, Wash. Post, Jan. 3, 1996, at A11.

²⁴ Stephen Barr and David Montgomery, *At Uncle Sam's No One Answer's*, Wash. Post, Nov. 16, 1995, at A1.

²⁵ *What's Essential?* *supra* note 13.

went unprocessed;²⁶ health, welfare, finance, and travel services for the Veterans Administration were severely curtailed;²⁷ and 363 National Park Service sites and national museums were closed. Communities near these parks reportedly lost an estimated \$14.2 million dollars per day in tourism revenues.²⁸

The legislation that ended the shutdown, in January 1996, brought the furloughed federal employees back to work, with back pay, but left a number of loose ends that placed additional burdens on government agencies and federal contractors.²⁹ For example, the Commerce Department, Environmental Protection Agency (EPA), and NASA, were provided no program funds.³⁰ Employees were required to report to work and wait for agency officials to explain what they would be allowed to do. The guidelines themselves were very general, authorizing departments and agencies caught in the shutdown to "conduct routine activities" and carry out "normal functions." At the same time, agencies were cautioned that they, "may incur only the minimum level of obligations for services necessary for employees to carry out their duties."³¹

²⁶ *Supra* note 23.

²⁷ *What's Essential?* *supra* note 13, (Statement by Eugene A. Bridkhouse, Assistant Secretary for Human Resources and Administration, Dep't of Veterans Affairs).

²⁸ *Shutdown Takes Toll on Superfund, National Parks*, Politics, USA Today, Jan. 2, 1996, at 1

²⁹ H.J. Res. 134, 104th Cong., 2nd Sess. (1996).

³⁰ *Id.*

³¹ *Supra* note 28.

B. Cost to Federal Contractors

The government relies on contractors to supply a wide variety of goods and services. In fiscal year 1994 the federal government purchased \$196.4 billion worth of goods nationwide, and nearly \$18 billion in the Washington area.³² Of the \$18 billion spent on Washington area contracts, \$3.7 billion, or over 20%, were let by federal departments and agencies which were forced to shutdowns due to the lack of appropriations.³³ In the Washington D.C. area alone over 700 companies, and approximately 50,000 employees, were affected by the shutdown.³⁴ Contractors that worked for departments whose appropriations were not approved until well into the fiscal year (the Labor and Commerce Departments, EPA, and NASA) were most affected by the shutdowns.³⁵ Both the Labor Department and the EPA ordered the majority of their contractors to "stop work" due to the shutdowns.³⁶

The shutdown touched many federal contracts. The resulting uncertainties caused some contractors to question their commitment to contract with the federal

³² Peter Behr, *Contractors Face Mounting Costs from Government Shutdowns*, Wash. Post, Jan. 23, 1996, at C1.

³³ *Id.* (As reported by the Federal Procurement Data Center (1996)).

³⁴ Fed'l Acquisition Special Rep., *Dealing with the Federal Shutdowns* (Mar. 1996).

³⁵ *Supra* note 28.

³⁶ Interview with Edward Murphy, Chief Procurement Policy Branch, EPA, Washington D.C. (Mar. 1996).

government.³⁷ According to OMB Deputy Director John A. Koskinen, "Over 50,000 small companies nationwide face[d] delayed federal payments, while others had millions of dollars of exports tied up on docks because there were no federal inspectors to clear their cargoes."³⁸ Federal shutdowns resulted in "frozen contracts, disrupted projects, furloughs, and a heightened anxiety about the future" for many federal contractors.³⁹ Many of these contractors sent their employees home without pay. Unlike their furloughed government employee counterparts, there was no mechanism to provide them back pay for the time they had been furloughed or laid off.⁴⁰ Of the contractors surveyed by Signet Banking Corporation, 63% experienced accounts receivable slowdowns, 55% carried additional debt, and 31% furloughed employees.⁴¹ A separate report found that slow payment from federal agencies required contractors to carry additional debt, finance government operations, and furlough employees.⁴² Slow startups on awarded contracts, delays, untimely government inspection and approval

³⁷ *Contractors Bear Brunt of Government Shutdowns and Budget Impasse*, The Government Contractor, Jan. 31, 1996.

³⁸ Dan Morgan and Stephen Barr, *When Shutdown Hits Home Ports*, Wash. Post, Jan. 8, 1996, at A1.

³⁹ Peter Behr, *Latest Federal Shutdown Hits Contractors Hard*, Wash. Post, Dec. 22, 1995 at D1.

⁴⁰ *Supra* note 5.

⁴¹ *Contractors Bear Brunt of Government Shutdowns and Budget Impasse*, The Government Contractor, Jan. 31, 1996.

⁴² Peter Behr, *Spending Deal is Little Help to Contractors*, Wash. Post, Jan. 30, 1996, at C3.

actions, and denial of access to government-furnished facilities all increased costs and time required for contract performance.⁴³

Small to medium sized contractors, whose performance depends in some way on either access to a Government facility or the presence of a Government workforce, were most affected by the shutdowns.⁴⁴ Typically, these companies live closest to the cash flow lifeline and have less access to credit.⁴⁵ Unlike larger companies, smaller companies are less able to mitigate the harm by shifting corporate resources to other projects. Absorbing such costs drove some companies out of business.⁴⁶

⁴³ *Supra* note 17.

⁴⁴ Peter Behr, *Latest Federal Shutdown Hits Contractors Hard*, Wash. Post, Dec. 22, 1995, at C1.

⁴⁵ Bill Murray, *Vendors Face Furlough Alone*, Wash. Post, Feb. 8, 1996, at A28.

⁴⁶ *Id.*

Chapter III. Overview of the Appropriation Process

A. Appropriation Acts

The United States Constitution reserves exclusively to Congress the authority to set limits on, and authorize,⁴⁷ expenditures by the Federal Government through the appropriation process.⁴⁸ An appropriation is a law passed by Congress and signed by the President, or enacted by a two-thirds majority of the House and Senate over a president's veto, which provides budget authority for a stated purpose.⁴⁹ Budget authority is the authority to incur a legal obligation to pay a sum of money from the United States Treasury.⁵⁰ Day to day operations of most federal agencies are funded by one of the thirteen annual appropriations bills. Each appropriations bill is considered to be individual legislation and can be enacted independently of the others.

⁴⁷ *United States v. MacCollom*, 426 U.S. 317, 321 (1976) ("The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.").

⁴⁸ *United States Const.* art. I, § 9, cl. 7 ("No money shall be drawn from the Treasury, but in consequence of appropriations made by law.").

⁴⁹ Appropriations, like any other legislation, require passage in each House and approval by the President. If the President vetoes an appropriation it may still become law with a two-thirds vote in each House. *United States Const.* art. I, § 7. This Article occasionally follows common practice in speaking of Congress as making the appropriations when the above joint process is actually meant.

⁵⁰ 31 U.S.C. § 1511 (1983).

Appropriations are distinguishable on the basis of both the purpose for which they are made,⁵¹ and the time period in which they may be obligated.⁵²

1. Purpose

One of the fundamental statutes, found within the Anti-Deficiency Act,⁵³ dealing with the use of appropriated funds is 31 U.S.C. § 1301(a), which states:

"Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."⁵⁴ Since money cannot be paid from the Treasury except under an appropriation (United States Constitution, article I, § 9, clause, 7), and an appropriation must be derived from an act of Congress, it is up to Congress to determine the purposes for which an appropriation may be used. If a proposed use of funds is inconsistent with the stated statutory language, the expenditure

⁵¹ 31 U.S.C. § 1301 (1983) (limits the obligation of appropriations to the purposes for which they were made).

⁵² 31 U.S.C. § 1501 (1983) (limits the obligation of an appropriation to a definite period of time).

⁵³ The Anti-Deficiency Act is actually several statutes enacted over a 124-year period. Congress passed, and the President signed, the general form of the Anti-Deficiency Act in 1870, Act of July 12, 1870, ch. 251, § 7, 16 Stat. 251, but predecessor provisions had applied to major departments of government since 1820. *See* Act of May 1, 1820, ch. 52, § 6, 3 Stat. 568. Several of the current statutory sections are 31 U.S.C. § 1341 (1983) (prohibiting obligations or expenditures in excess of appropriations and contracting in advance of an appropriation); 31 U.S.C. § 1342 (1983) (prohibiting government employees from accepting voluntary services); and 31 U.S.C. §§ 1511-17 (1983) (requiring apportionment or administrative subdivision of funds and prohibiting obligations or expenditures in excess of apportionment or administrative subdivision of funds).

⁵⁴ The Anti-Deficiency Act forbids diversion of an appropriation to an unauthorized purpose. 31 U.S.C. §§ 1301, 1347 (1983).

is improper, even if it would result in a benefit to the government.⁵⁵ Likewise, deliberately charging the wrong appropriation for purposes of expediency or administrative convenience, violates 31 U.S.C. § 1301(a).⁵⁶

Practical considerations favor the enactment of lump sum appropriations, stated in terms of broad object categories such as "operations and maintenance," or "salaries and expenses." Unless an acquisition program has been restricted to a particular dollar limitation, rate of expenditure, or type of system to be procured, the procuring agency has the discretion to prioritize and allot funds from a lump sum appropriation as it deems necessary between and among various acquisitions.⁵⁷

2. Period of Availability

An obligation is any agreement or act that creates a legal duty upon a federal agency to disburse appropriated funds⁵⁸ A contract creates an obligation at the point it becomes a binding agreement.⁵⁹ Most funds appropriated by Congress are available for initial

⁵⁵ To the Administrator, Federal Aviation Agency, B-143536, 1960 WL 3494 (Comp. Gen. 1960) (Federal Aviation Agency could construct its own roads to access FAA facilities, but could not contribute a share for the improvement of county-owned roads, even though the latter would have been much less expensive).

⁵⁶ To the Secretary of Commerce, 36 Comp. Gen. 386 (1956); Assistant Comptroller General to the Secretary of the Treasury, 26 Comp. Gen. 902, 906 (1947).

⁵⁷ In the Matter of the LTV Aerospace Corp., 55 Comp. Gen. 307 (1975); In the Matter of the Newport News Shipbuilding and Dry Dock Co., 55 Comp. Gen. 812 (1976).

⁵⁸ OMB Circular A-34 § 11.5, (Dec. 1995) (Incurred obligations include amounts of orders placed, contracts awarded, services received, and similar transactions that will require payments during the same or a future period); *see also* Defense Finance and Accounting Services-Indianapolis Reg. 37-1, Finance and Accounting Policy Implementation, para. 9-1 (Sep. 1995).

⁵⁹ Dep't of the Treasury, Customs Service, 59 Comp. Gen. 431 (1980).

obligation⁶⁰ for only a finite period of time.⁶¹ This period of availability is the period within which an agency must incur new obligations.⁶² However, the period of availability does not limit the time within which an agency may disburse funds. An agency may properly disburse funds even after an appropriations period of availability has ended.

A large portion of the government's routine activities are financed by annual appropriations. These appropriations are made for a specified fiscal year and are available for obligation only during the fiscal year for which made.⁶³ These funds must either be spent, or obligated for future expenditure by a contract, or otherwise obligated within the fiscal year for which they are made. The Federal Government's fiscal year runs from 1 October through 30 September of the following year.⁶⁴ All appropriations

⁶⁰ B-116795, Jun. 18, 1954, *cited* in GAO/OGC-92-13 Appropriations Law, Vol. II at 7-3 ("An obligation is a binding commitment which creates a legal liability of the Government for the expenditure of appropriated funds for goods and services ordered or received."); *see also* 31 U.S.C. 1501(a) which states the rules for creating a valid obligation within the period of availability. The Comptroller General has interpreted this statute at 35 Comp. Gen. 319 (1955).

⁶¹ 13 Op. Att'y Gen. 288, 292 (1870). ("Congress has the right to limit its appropriations to particular times as well as to particular objects, and when it has clearly done so, its will expressed in the law should be implicitly followed."); *See also*, 31 U.S.C. § 1552 (1983) (An appropriation is available for obligation for a definite period of time. Agencies must obligate appropriations during this period of availability, or the authority expires.).

⁶² 37 Comp. Gen. 861 (1958).

⁶³ 31 U.S.C. § 1502 (1983); National Endowment for the Arts - Time Availability for Appropriations, B-244241, 71 Comp. Gen. 39 (1991); Population Institute v. McPherson, 797 F.2d 1062, 1071 (D.C. Cir. 1986).

⁶⁴ 31 U.S.C. § 1102 (1983).

are presumed to have a one-year period of availability unless the appropriation expressly states otherwise.⁶⁵

A multiple-year appropriation is treated exactly like a one-year appropriation except that the period of availability for obligation is extended to the period specified in the appropriation.⁶⁶ Multiple-year appropriations expressly provide that they remain available for obligation for a definite period in excess of one fiscal year.⁶⁷

Appropriations for Research, Development, Test and Evaluation (RDT&E) are generally available for two fiscal years, the Procurement appropriations for three fiscal years, and the Military Construction appropriations for five fiscal years. Revolving funds, Defense Business Operations Funds, and "no-year" funds have virtually unlimited periods of availability.⁶⁸ Congress has authorized revolving funds to be self

⁶⁵ 31 U.S.C. § 1301(c) (1983) ("An appropriation in a regular, annual appropriation law may be construed to be permanent or available continuously only if the appropriation....(2) expressly provides that it is available after the fiscal year covered by the law in which it appears."); *See also*, 58 Comp. Gen. 321 (1979); B-118638, Nov. 4, 1974.

⁶⁶ A multiple-year appropriation should not be confused with the concept of multiyear procurement which is a contract covering more than one year's requirements but budgeted and financed in annual increments. The contractor is protected against loss resulting from cancellation by allowing reimbursement of unrecovered non-recurring costs. In multiyear procurement the government's obligation to pay costs in excess of the first year requirements, and any cancellation costs, is subject to the availability of funds.

⁶⁷ GAO's Policy and Procedures Manual for Guidance of Federal Agencies, Fiscal Guidance, title 7, chapter 2, para. 2.1.C.1.b. (February 12, 1990); 37 Comp. Gen. 861 (1958).

⁶⁸ *See, e.g.* National Defense Authorization Act for FY 1995, P.L. 103-337, § 311, 108 Stat. 2663 (1994) ("Defense Business Operations Fund").

sustaining through receipts generated by their operation.⁶⁹ No-year funds include appropriations made available until expended or until the accomplishment of a specified purpose.⁷⁰ The appropriating language must expressly establish the no-year condition.⁷¹

3. Expired and Closed Appropriations

Appropriations that have not been obligated within their period of availability⁷² are considered to be expired appropriations.⁷³ These expired appropriations continue in an expired status for up to five fiscal years from the end of the period of availability, and remain available for limited within-scope adjustments to existing obligations.⁷⁴ At the end of the fifth year after the period of availability of a fixed appropriation ends the account is closed, all remaining obligated and unobligated balances in the account are canceled, and no funds from the closed account are available thereafter for obligation or

⁶⁹ *Id.*

⁷⁰ 31 U.S.C. § 1301(c) (1983); To the Administrator, Federal Aviation Agency, 40 Comp. Gen. 694, 696 (1961).

⁷¹ *Id.*

⁷² 31 U.S.C. §§ 1502, 1552(a) (1983); (Funds are presumed to be available for obligation only during the fiscal year in which they are appropriated).

⁷³ 31 U.S.C. § 1553 (a) (1983) (Appropriations whose availability for new obligations has expired, but which retain their fiscal identity and are available to adjust and liquidate previous obligations).

⁷⁴ 59 Comp. Gen. 518 (1980); 31 U.S.C. § 1553 (c) (1983) (If the appropriation has expired and if an obligation of funds from that appropriation is required to provide funds for a program, project, or activity to cover a contract change over \$25 million - Congress must be notified 30 days before obligating the funds. For purposes of the notice requirements, a "contract change" is defined as a change to a contract that requires the contractor to perform additional work. The definition specifically excludes adjustments necessary to pay claims or increases in contract price due to the operation of an escalation clause in the contract).

expenditure for any purpose.⁷⁵ If an adjustment is chargeable to a canceled appropriation, an agency may, within very narrow limits, charge the adjustment to a current appropriation available for the same purpose.⁷⁶ This however, reduces the agency's authority to incur new obligations. The impending cancellation of an expired appropriation provides an incentive for contracting officers to make adjustments to that appropriation to avoid having to charge current funds. However, during a funding gap there are no current annual funds. A contracting officer must ensure that he does not create obligations against such funds, for to do so would violate the Anti-Deficiency Act by obligating funds in advance of an appropriation.⁷⁷

B. Continuing Resolutions

For a variety of reasons, any or all of the thirteen regular appropriations may not be signed into law by the start of a fiscal year.⁷⁸ When this occurs, affected agencies may experience a general lapse in appropriations, called a "funding gap."⁷⁹ Congress and the

⁷⁵ 31 U.S.C. § 1552 (1983).

⁷⁶ 31 U.S.C. § 1553(b) (1983) (The charges are limited to the lesser of the unobligated expired balance of the original appropriation available for the same purpose, or one percent of the current appropriation available for the same purpose).

⁷⁷ 31 U.S.C. § 1341(a) (1983).

⁷⁸ (The House or Senate might not finish its work on an appropriation bill; there may be differences between the House and Senate versions of the bill that cannot be resolved by a House/Senate conference committee; the President may veto an appropriations bill thus requiring the bill to be reprocessed by the House and Senate and resubmitted to the President).

⁷⁹ General Accounting Office. Principles of Federal Appropriations Law, 2d ed. (OGC 91-5, Jul. 1991), at 6-92 ("A funding gap is the period of time between the expiration or exhaustion of an appropriation and the enactment of a new one.").

President often work together to avoid funding gaps by enacting continuing resolutions.⁸⁰ GAO defines a continuing resolution as: "Legislation enacted by Congress to provide budget authority for Federal agencies and/or specific activities to continue in operation until the regular appropriations are enacted. Continuing resolutions are enacted when action to pass an appropriation is not completed by the beginning of the fiscal year."⁸¹ Without this mechanism agencies would have no interim funding to continue most operations which require current year funding, nor would they be able to avoid the consequences of a funding gap.

When enacted into law, funds provided through a continuing resolution are subject to all the fiscal limitations of time, purpose, and amount, just like an appropriations act.⁸² However, continuing resolutions usually do not specify an actual dollar amount that may be spent, but instead refer to a "rate of operations" that is keyed to congressional action on other legislation,⁸³ or a "minimum level that would enable existing activities to continue."⁸⁴ This rate is typically the lowest of (1) the previous year's funding level, (2) the House-approved level for the current year, or (3) the Senate-approved level for

⁸⁰ GAO/OGC-92-13 Appropriations Law - Vol. II, at 8-3. ("A Continuing Resolution is a joint resolution that must be passed by the House and Senate and signed by the President. Upon Presidential signing, the continuing resolution provides temporary budget authority until regular appropriations are enacted or until the continuing resolution expires.").

⁸¹ See GAO, "A Glossary of Terms Used in the Federal Budget Process" (PAD-81-27)(3d. ed., Mar. 1981), at 42.

⁸² *Oklahoma v. Weinberger*, 360 F. Supp. 724 (W.D. Okla. 1973); Secretary of State-Agency for Int'l Development., B-152554, Dec. 15, 1970 (unpublished).

⁸³ *Id.* at 7.

⁸⁴ H.J. Res. 153, § 111, (P.L. 104-90) (1996).

the current year. Congress may always specify an additional spending-reduction percentage that would be applied to the previously determined limit.⁸⁵ It is important for agencies to know the amount appropriated by the continuing resolution to ensure that they do not make obligations which exceed that amount, thereby creating an Anti-Deficiency Act violation.⁸⁶

Each continuing resolution must specify when the temporary funding authority expires. If adequate funding is available, an agency may award a contract with a performance date that extends beyond the continuing resolution period.⁸⁷ The continuing resolution is thus a window of opportunity in which to continue to incur obligations. If an appropriations bill, or a continuing resolution, is not passed before the start of a new fiscal year the affected agencies have no authority to continue to obligate funds.⁸⁸ They must begin to shutdown operations that are not "essential" or

⁸⁵ e.g., The first continuing resolution of fiscal year 1996 required an additional 5 percent reduction below the lowest funding level identified above. H.J. Res. 108 (P.L. 104-31), signed Sep. 30, 1995.

⁸⁶ *Supra* note 53; 31 U.S.C. § 1341 states, in relevant part: "An officer or employee of the United States Government ... may not make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation."

⁸⁷ However, there may be instances where severability issues would preclude award of some contracts. The significance is that agencies must fund severable service contracts with funds current when the services are performed, and must fund nonseverable service contracts with funds current at contract award, even though performance may extend into a subsequent fiscal year. See Contract Law Div. Note, Funding of Service Contracts: The GAO Clarifies the Rules, Army Law., Sep. 1994, at 34.

⁸⁸ John R. Kasich, *A Primer on Continuing Resolutions and the Ceiling on the Public Debt*, Washington, D.C., U.S. House of Representatives, 1995, at 10.

necessary for the protection of life and property.⁸⁹ Conversely if an appropriations bill or a new continuing resolution is passed, agencies will again have funding authority.

C. Anti-Deficiency Act

The Anti-Deficiency Act is comprised of a number of statutes by which Congress exercises its constitutional control over public funds.⁹⁰ Through the Anti-Deficiency Act, Congress seeks to, "prevent executive officers from involving the Government in expenditures or liabilities beyond those contemplated and authorized by the law making power."⁹¹

Key to the Anti-Deficiency Act is the provision that officers or employees of the United States Government may not "make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or

⁸⁹ GAO Report: Funding Gaps Jeopardize Federal Government Operations, B-202135 (PAD-18-31), Mar. 1981

⁹⁰ *Supra* note 53; Hopkins & Nutt, The Anti-Deficiency Act (Revised Statutes 3679) and Funding Federal contracts: An Analysis, 80 Mil. L. Rev. 51 (1978).

⁹¹ 21 Op. Att'y. Gen. 244 (1895); *See also* 42 Comp. Gen. 272, 275 (1962). Therein the Anti-Deficiency Act is summarized as follows: "These statutes evidence a plain intent on the part of the Congress to prohibit executive officers, unless otherwise authorized by law, from making contracts involving the Government in obligations for expenditures or liabilities beyond those contemplated and authorized for the period of availability of and within the amount of the appropriation under which they are made; to keep all the departments of the Government, in the matter of incurring obligations for expenditures, within the limits and purposes of appropriations annually provided for conducting their lawful functions, and to prohibit any officer or employee of the Government from involving the Government in any contract or other obligation for the payment of money for any purpose, in advance of appropriations made for such purpose; and to restrict the use of annual appropriations to expenditures required for the service of the particular fiscal year for which they are made."

obligation."⁹² This prohibits expenditures or obligations in excess of, and in advance of, appropriations.⁹³ The Anti-Deficiency Act also bars an officer or employee from "involving the government in a contract or obligation for the payment of money before an appropriation is made, unless authorized by law."⁹⁴ Absent an exception authorized by law,⁹⁵ federal employees are prohibited from entering into contracts which obligate the government to incur costs before Congress has appropriated funds for that purpose.⁹⁶ To enforce this prohibition against over-obligating or over-expending funds the Anti-Deficiency Act requires administrative discipline for those who inadvertently exceed their authority, and criminal penalties for those who knowingly and willfully do so.⁹⁷

⁹² 31 U.S.C. § 1341 (a)(1)(A) (1983).

⁹³ Interagency Agreement Between Employment and Training Administration and Bureau of Int'l Labor Affairs (Dep't Labor, 1992), 71 Comp. Gen. 402 (1992), B-245541.

⁹⁴ 31 U.S.C. § 1341(a)(1)(B) (1983); Propriety of Continuing Payments under Licensing Agreement, 66 Comp. Gen. 556 (1987), B-225039, where 20 year agreement violated this provision because the agency had only one-year appropriations.

⁹⁵ Contingency Funding, Federal Acquisition Regulation (FAR) § 32.705. (This section identifies an important exception when the government intends to initiate action on a contract chargeable to a new fiscal year before funds are available for that year or because it contemplates award of a multi-year contract funded each year by annual appropriations. In either case the contract must expressly provide that the government's liability is contingent upon the future availability of appropriations). See Availability of Funds clause, FAR § 52.232-18 and FAR § 52.232-19; Limitation of Funds clause FAR § 52.232-22.

⁹⁶ To the Secretary of the Air Force, 42 Comp. Gen. 272 (1962), B-144641.

⁹⁷ Administrative discipline may include anything up to removal from office. Criminal violations entail a fine of not more than \$5,000 or imprisonment for not more than two years, or both. 31 U.S.C. §§ 1349, 1350, 1518 and 1519 (1983).

The Anti-Deficiency Act also limits acceptance of voluntary service.⁹⁸ Early cases focused on whether the service was truly intended to be gratuitous.⁹⁹ Congress had failed to appropriate funds for the payment and support of the Army and Navy after June 30, 1877. Private contributions were proposed as a substitute.¹⁰⁰ The Attorney General noted that existing legislation allowed limited action, without violating the Anti-Deficiency Act, for appropriation of clothing, subsistence and other specified expenditures.¹⁰¹ However, he found no comparable statutory exception for arms, ammunition, civilian employees and pay for the army. He rejected the use of private contributions for these expenditures arguing in the alternative that outside funds, once paid into the Treasury, required appropriation or the use of such contributions would place the government under a moral obligation to repay the funds, "and thus seek to do indirectly what Congress should have done directly."¹⁰² The opinion concludes that to allow private support when the legislative process fails to appropriate funds impermissibly shifts control from Congress. Neither the moral and practical claims for

⁹⁸ 31 U.S.C. § 1342 (1983) ("An officer or employee of the United States Government or of the District of Columbia Government may not accept voluntary services for either government or employ personal services exceeding that authorized by law *except* for emergencies involving the safety of human life or the protection of property...."); *See also* To Glenn English, B-223857, Feb. 27, 1987.

⁹⁹ 30 Op. Att'y Gen. 51 (1913); *See also* Gladys Noon Spellman, B-197841, Mar. 3, 1980, (unpublished).

¹⁰⁰ Support of the Army, 15 Op. Att'y Gen. 209 (1877).

¹⁰¹ *Id.* at 210; Act of March 2, 1861, ch. 84, § 10, 12 Stat. 220 (codified as amended at 41 U.S.C. § 11 (1987)).

¹⁰² *Id.* at 211.

army pay nor the President's special role as Commander-in-Chief permitted erosion of that decision-making power.¹⁰³ These principles continue to apply today.

Voluntary services may be accepted if the services are intended to be gratuitous and are unconditionally given under circumstances in which no claim for payment for services rendered will be made against the government.¹⁰⁴ The Justice Department's Office of Legal Counsel stated, "The weight of authority does support the view that section [1342] was intended to eliminate subsequent claims against the United States for compensation of the 'volunteer,' rather than to deprive the government of the benefit of truly gratuitous services."¹⁰⁵

However, unless a statute authorizes gratuitous services, acceptance of services may be an improper augmentation of an appropriation if federal employees normally perform the work.¹⁰⁶ Generally volunteers may augment the work force, but may not be used to displace current employees. Moreover, volunteers may not be used for unfilled positions of paid employees, and federal employees may not volunteer to work for their agency in an unpaid status during a lapse in funding.¹⁰⁷

¹⁰³ *Id.*

¹⁰⁴ Army's Authority to Accept Services From the American Association of Retired Persons/National Retired Teachers Association, B-204326, Jul. 26, 1982 (unpublished) (written agreement to waive entitlement to compensation).

¹⁰⁵ 6 Op. Off. Legal Counsel 160, 162 (1982).

¹⁰⁶ Community Work Experience Program - State Gen. Assistance Recipients at Federal Work Sites, B211079.2, Jan. 2, 1987 (unpublished).

¹⁰⁷ 31 U.S.C. § 1342 (1983).

William O. Fink, a federal employee of the National Park Service, gained national attention when he tried to continue working during the November 1995 shutdown despite being furloughed.¹⁰⁸ His effort ended soon after he was warned that continued disregard for his furlough status could be viewed as a violation of the Anti-Deficiency Act. Approximately one month later, during the second shutdown, about 100 furloughed employees from the Social Security Administration staged a “work-in” at their Woodland, Maryland office. The event lasted only a short time before these employees were forced to leave. The agency would have violated the Anti-Deficiency Act (creating an obligation on the part of the government to pay those employees in advance of an approved appropriation) had it allowed the furloughed employees to continue working.

The prohibition against acceptance of voluntary service also includes services provided by contractors. The prohibition includes arrangements in which the government permits a contractor to continue performance on a “temporarily unfunded” basis while the agency, which has exhausted its appropriations and can't pay the contractor immediately, seeks additional appropriations. In *To the Chairman, Committee on Appropriations, House of Representatives*, February 19, 1976,¹⁰⁹ the Army asked whether they could leave existing contracts in place, tacitly encourage continued performance, and receive the benefits of performance, but at the same time require the contractor to assume the risk of nonpayment. The Comptroller General

¹⁰⁸ Stephen Barr, *Government Shutdown*, Wash. Post, Dec. 22, 1995, at C3.

¹⁰⁹ 55 Comp. Gen. 768, B-132900 (1976).

stated that this proposal would not achieve the desired result of freezing the government's liability at the amount due under the contract. Congress would be placed in the position of either fully appropriating for contract performance or, by refusing to appropriate, allow the army a windfall at the expense of the contractor. The Comptroller General found the proposed action "of dubious validity at best" as a means of mitigating the effects of any resulting Anti-Deficiency Act violation.¹¹⁰ This was not an example of gratuitous work. The government expected the benefits of the contractor's performance, and the contractor expected to eventually be paid.

D. Funding Gaps - Shutdowns

1. Fiscal Year 1977 through Fiscal Year 1995

Funding gaps are not uncommon. During the 19 year period covering fiscal years 1977-1995, a total of 55 continuing resolutions were enacted into law to continue to fund the government.¹¹¹ Only in fiscal years 1989 (when Congress and the President enacted all thirteen appropriations bills prior to the onset of the fiscal year) and 1995 were no continuing resolutions needed to continue funding the government. During this same 19 year period there have been 15 funding gaps (ranging in length from one to seventeen days) applied to a total of 11 fiscal years.¹¹²

¹¹⁰ *Id.* at 779.

¹¹¹ Federal Budget Report, Special Report Continuing Resolutions and Funding Gaps, Aug. 25, 1995.

¹¹² *Id.*

Lengthy funding gaps occurred in fiscal years 1977-1980 (lasting from eight to seventeen days), however they had little effect on government operations. Federal managers, while aware of the anomaly of continuing to operate during a lapse in appropriations, were not concerned about the legal implications.¹¹³ They acted under the belief that "Congress (did) not actually intend that the federal government shut down while the agencies wait for the enactment of appropriations or the passage of a continuing resolution."¹¹⁴ GAO found that Congress had "implicitly lent credence to this view" by retroactively funding the government with contingency resolutions and by not using the Anti-Deficiency Act to penalize agencies that continued to operate despite each lapse in appropriations.¹¹⁵

United States Attorney General Benjamin Civiletti clarified applicability of the Anti-Deficiency Act to funding gaps on April 25, 1980 when he stated, "...during periods of 'lapsed appropriations,' no funds may be expended except as necessary to bring about the orderly termination of an agency's functions, and that the obligation or expenditure of funds for any purpose not otherwise authorized by law would be a violation of the Anti-Deficiency Act."¹¹⁶ "The Department of Justice will take actions to enforce the

¹¹³ U.S. General Accounting Office. Funding Gaps Jeopardize Federal Government Operations, Washington, D.C., U.S. Government Printing Office, Mar. 3, 1981.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Applicability of the Anti-Deficiency Act upon a lapse in Agency Appropriations, 43 Op. Att'y Gen. 24 (Apr. 1980).

criminal provisions of the Anti-Deficiency Act in appropriate cases in the future when violations of the Anti-Deficiency Act are alleged.”¹¹⁷

Following this opinion, funding gaps began to be taken more seriously. The Federal Government experienced its first partial shutdown on 20 November 1981.¹¹⁸ Since that shutdown, the country has experienced eight funding gaps.¹¹⁹ Most lasted only a few days, and occurred during weekends, when most federal activities were already curtailed. Accordingly, earlier shutdowns had minimal impact on government and contractor operations. The last funding gap, prior to the fiscal year 1996 shutdowns, occurred in fiscal year 1991. Because this five-day gap occurred over a weekend, disruption to federal activities was relatively light.¹²⁰

2. Fiscal Year 1996

Soon after the Republican-controlled Congress began to consider the fiscal year 1996 appropriations bills it became clear that their political agenda, that of using the appropriation process to reduce the deficit and obtain a balanced budget within seven

¹¹⁷ *Id.* at 6.

¹¹⁸ Weekend Contest Produces 3-Week Funding Accord; Government Shutdown Ends and Funding Gap Led to Sweeping Shutdown...But No Lapse in Essential U.S. Services, 39 Congressional Quarterly Weekly Report 48, 2324-2327 Nov. 28, 1981 (Impact - Federal employees were sent home for half a day due to the budgetary impasse between the President and Congress).

¹¹⁹ Data on Effects of 1990 Columbus Day Weekend Funding Lapse, GAO/GGD-91-17FS, Oct. 19, 1990.

¹²⁰ *Id.*

years, would clash with the President's agenda.¹²¹ By the first day of fiscal year 1996, Congress had forwarded only three of the thirteen appropriations bills to the President for signature, and the President had signed only two; the Military Construction and the Department of Agriculture appropriations bills.¹²² President Clinton refused to sign the third bill, the Legislature Branch appropriations bill, until the bills for the other agencies had been enacted.¹²³ The remaining bills were pending, vetoed, or under threat of veto by the President.¹²⁴ Congress and the President were, however, able to enact a continuing resolution which remained in effect from October 1, 1995 to November 13, 1995.¹²⁵ The Republican's goal of down-sizing the government through reduced appropriations was reflected in this continuing resolution. It required agencies to reduce their rate of operations by at least five percent.¹²⁶ During the months that followed, two partial shutdowns occurred which were unprecedented in both scope and duration.

¹²¹ *If Train Wreck Happens, What About Congress?*, Roll Call, Nov. 13, 1995 (The veto of the Legislature Branch appropriations bill marked the first time since 1920 that a president refused to enact Congress' annual budget).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ 53 Congressional Quarterly Weekly Report 45, 3573, Nov. 18, 1995.

¹²⁵ H.R.J. Res. 108, 104th Cong., 1st Sess. (1995).

¹²⁶ H.R.J. Res. 108, 104th Cong., 1st Sess. §§ 111, 115 (1995) (enacted); *See also* 141 Cong. Rec. S14637 (daily ed. Sept. 29 1995) (Statement of Sen. Hatfield, Chairman of the Senate Appropriations Committee): "This bill continues ongoing programs at restrictive rates that are the average-less 5 percent-of the 1996 levels in the House-passed and Senate-passed bills. For those programs that are terminated or significantly affected by either the House or Senate bills, the rate may be increased to a minimal level, which could be up to 90 percent of the current rate. In any instance where the application of the formula would result in furloughs, than the rate can be increased to a level just sufficient to avoid furloughs."

A. The First Shutdown (November 14, 1995 through November 19, 1995)

The first partial shutdown began at 12:01 a.m. on 14 November 1995.¹²⁷ While the shutdown was only six days long, it resulted in the furlough of an estimated 800,000 federal employees deemed “non-essential” by their agencies.¹²⁸ The Office of Management and Budget (OMB) required all agencies to list the functions of “non-essential” employees in agency contingency shutdown plans for OMB review, and approval, prior to the shutdown.¹²⁹ “Essential” employees were required to work throughout the shutdown in a non-pay status

By November 19, Congress and the President agreed on the terms of a second continuing resolution.¹³⁰ This continuing resolution extended government funding through 15 December 1995, but retained the requirement that programs targeted for significant reduction or termination operate at a lower rate of operation (75% of the current rate).¹³¹ Additionally, the continuing resolution appropriated only that amount

¹²⁷ Expiration of H.R.J. Res. 108, 104th Cong., 1st Sess. (1995) and President Clinton’s veto of a second continuing resolution (H.R.J. Res. 115, 104th Cong., 1st Sess. (1995)) (The President did, however, sign HR 1905 into law which provided funding for the Department of Energy, portions of the Departments of Interior and Defense, the Army Corps of Engineers. Federal workers of these agencies were permitted to go back to work immediately).

¹²⁸ American Federation of Government Employees, Civ. A. No. 95-2115, 1995 WL 697236 (D.D.C. 1995).

¹²⁹ Agency Plans of Operations during Funding Hiatus, Office of Management and Budget, Wash. Aug. 22, 1995.

¹³⁰ H.R.J. Res. 122, 104th Cong., 1st Sess. (1995).

¹³¹ *Id.* at § 111.

necessary to accomplish the orderly termination of specified government activities.¹³²

The continuing resolution also contained a “Commitment” provision requiring both Congress and the President to balance the federal budget by no later than the year 2002.¹³³ Finally, the continuing resolution agreed to pay the salaries of federal employees that had been furloughed during the shutdown, and ratified specific obligations.¹³⁴

B. The Second Shutdown (December 16, 1995 through January 6, 1996)

By mid-December six of the thirteen appropriations bills that fund government operations were either unapproved by Congress or unsigned by the President.¹³⁵ With no agreement on another continuing resolution, and expiration of H.J. Res 122, 104th Cong., 1st Sess, the second partial shutdown began at 12:01 a.m. on 16 December 1995. This shutdown lasted a record 21 days, finally ending on 6 January 1996.¹³⁶ The initial

¹³² *Id.* at § 123 (Those government agencies which were specifically mentioned were the Interstate Commerce Commission, the Administrative Conference of the United States, Advisory Commission on Intergovernmental Relations, Pennsylvania Avenue Development Corporation, Land and Water Conservation Fund, and Office of Surface Mining Reclamation and Enforcement Rural Abandoned Mine Program.

¹³³ *Id.* at § 203.

¹³⁴ *Id.* at § 124. With respect to ratification authority, this section provides:

(b) All obligations incurred in anticipation of the appropriations made and authority granted by this Act for the purposes of maintaining the essential level of activity to protect life and property and bring about orderly termination of government functions are hereby ratified and approved if otherwise in accordance with the provisions of this Act.

¹³⁵ Tony Locy, *Breakthrough Lets D.C. Avoid Federal Shutdown*, Wash. Post, Dec, 17 1995, A8.

¹³⁶ H.R.J. Res. 134, 104th Cong., 1st Sess. (1995).

estimate of furloughed government employees was set at 260,000.¹³⁷ The total number of furloughed federal employees was greatly reduced from those furloughed during the first shutdown because agencies whose regular appropriation had been passed into law were not required to take such drastic shutdown measures during the second shutdown. A second estimate, released 2 January 1996, showed that the number of furloughed employees was actually closer to 284,000, with a daily estimated payroll cost of \$44 million.¹³⁸

This shutdown ended when President Clinton signed continuing resolution H.J. Res. 134, 104th Cong., 1st Sess. into law. This resolution funded most of the federal government through 26 January 1996 and returned all furloughed federal employees to work with retroactive pay from 16 December 1995, through 6 January 1996. The reopening allowed many stalled agencies to resume activities, but new funding for thousands of federal contractors remained blocked.¹³⁹ In addition, the continuing resolution failed to provide operating funds for some agencies.¹⁴⁰ Some federal employees were required to return to work, but were unable to resume their basic duties.

¹³⁷ Figure supplied by the Office of Budget Review, Office of Management and Budget (OMB), Dec. 18, 1995.

¹³⁸ Figure supplied by the Office of Budget Review, Office of Management and Budget (OMB), Jan. 2, 1996.

¹³⁹ Dan Morgan and Stephen Barr, *Under Pressure, House GOP Adds to List of Protected Activities*, Wash. Post, Jan. 6 1996 at C3.

¹⁴⁰ Government agencies unfunded since the beginning of the FY, included Commerce, Education Health and Human Services, Housing and Urban Development, Interior, Justice, Labor, State, and Veterans Affairs Departments, The Environmental Protection Agency and the National Aeronautic and Space Administration.

For example, toxic waste cleanup at Superfund sites were delayed, and the Small Business Administration began answering calls, but was unable to make any loans.¹⁴¹

C. The Rest of 1996

The months that followed were full of confusion and uncertainty.¹⁴² Because of the threat of a third shutdown many agencies were reluctant to carry on business as usual, resulting in contract slowdowns or deferral of new contract starts. On 26 January 1996, President Clinton signed H.R. 2880 (P.L. 104-99; 110 Stat. 26) into law. This provided funding, for affected agencies, through 15 March 1996. On 14 March 1996, H.J. Res. 163 (P.L. 104-116; 110 Stat. 826) was enacted. This extended temporary funding for the government through 22 March 1996. On 22 March 1996, H.J. Res. 165 (P.L. 104-118; 109 Stat. 961) was enacted, which extended funding through 29 March 1996. On 29 March 1996 H.J. Res. 170 (P.L. 104-122; 110 Stat. 876) was enacted, funding the government through 24 April 1996. On 24 April 1996, H.J. Res. 175 (P.L. 104-131; 110 Stat. 1213) was enacted, funding the government for an additional 24 hours. Finally, on 25 April 1996, Congress and the President reached agreement on the Omnibus

¹⁴¹ Eric Pianin and John F. Harris, *Congress Clears Temporary Measures to End Partial Government Shutdown*, Wash. Post, Jan. 6 1996 at A2.

¹⁴² Morgan & Barr, *supra* note 135, at C3 (The only money available to NASA was that approved in earlier fiscal years. With funding set to run out the week of 22 January 1996, NASA was forced to consider stopping work on both the shuttle program and the space station).

Appropriations Act for fiscal year 1996, which was signed into law by the President on April 26.¹⁴³ This measure funded the government for the remainder of fiscal year 1996. Congress and the President passed a total of thirteen short term spending bills since the beginning of fiscal year 1996.

¹⁴³ H.R.J. Res. 3019, 104th Cong., 2nd Sess., Pub. L. No. 104-134, 110 Stat. 1321 (1996).

Chapter IV. Permissible Government Activity During Government Shutdowns

A. Applicability of the Antideficiency Act

A significant question the government must answer during a funding gap is what federal activities should, and should not continued. There is no specific statutory answer to this question however, two provisions of the Anti-Deficiency Act are particularly relevant. First, an officer or employee can not involve the government “in a contract or obligation for the payment of money before an appropriation is made, unless authorized by law.”¹⁴⁴ The second provision prohibits officers or employees of the government from accepting voluntary services or employing personal services “exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property.”¹⁴⁵ Read together these provisions of the Anti-Deficiency Act appear to require the government to shutdown everything except emergency services during a funding gap.

In late 1979 both the Office of Management and Budget (OMB) and the General Accounting Office (GAO) advised agencies that during a lapse in funding they were not to incur any “controllable obligations” such as hiring, grantmaking, and nonessential obligations, or make expenditures against appropriations, for the following fiscal year,

¹⁴⁴ 31 U.S.C § 1341 (1983).

¹⁴⁵ 31 U.S.C § 1342 (1983).

until appropriations were enacted by Congress.¹⁴⁶ However, during the funding gap that immediately followed, the Director of GAO ordered his employees to continue to report to work as normal.¹⁴⁷ GAO did not close its doors, instead it issued a memorandum to its employees directing them to “restrain FY 1980 obligations to only those essential to maintain day-to-day operations.”¹⁴⁸ The memorandum said it did not believe Congress intended the GAO to close down until an appropriation became law. GAO employees thus remained on the job and performed their regular duties.¹⁴⁹ The GAO, recognizing an apparent contradiction in the existing legislation, concluded that an officer or employee who permits employees to work during a lapse in funding may violate the Anti-Deficiency Act, however, the opinion stated that Congress did not intend to close federal agencies during a period of lapse.¹⁵⁰ The general pattern of ratification of the obligations incurred during the lapse period suggested approval of the agencies’ past behavior in remaining operational.¹⁵¹

¹⁴⁶ Federal Pay Continuity Act: Hearings on H.R. 5995 Before the Subcomm. On Compensation and Employment Benefits of the House Comm. On the Post Office and Civil Serv., 96th Cong., 2nd Sess. 80 (1980).

¹⁴⁷ GAO Memorandum of October 1, 1979, reprinted in 125 CONG. REC. 26,974 (1979) (Statement of Sen. Magnuson noting that Congress had failed to pass FY 1980 GAO Appropriation or Continuing Resolution in a timely manner).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Supra* note 146.

¹⁵¹ *Supra* note 116.

B. Early Attorney General Opinions

Congress has never passed legislation that explains in detail which departments and agencies would be allowed to continue functioning during a funding gap and which would have to shut down. As a result, the answer has largely been determined by the standard practices that have been adopted over the years whenever a funding gap has occurred, and the opinions issued by the Attorney General. In 1980, in response to a question by President Carter, U.S. Attorney General Benjamin R. Civiletti issued an opinion which rejected the view that agency employees could continue to work without an appropriation. He concluded that the government was required to "shutdown" during a funding gap.¹⁵² He wrote: "It is my opinion that, during periods of lapsed appropriations, no funds may be expended except as necessary to bring about the orderly termination of an agency's functions, and that the obligation or expenditure of funds for any purpose not otherwise authorized by law will be a violation of the Anti-Deficiency Act."¹⁵³ He further wrote, "Federal agencies may incur no obligations that cannot lawfully be funded from prior appropriations unless such obligations are otherwise authorized by law. There are no exceptions to this rule."¹⁵⁴ He concluded that the Department of Justice would take action to enforce the criminal provisions of

¹⁵² Applicability of the Anti-Deficiency Act upon a lapse in Agency Appropriations, 43 Op. Att'y Gen. 24 (Apr. 1980)..

¹⁵³ *Id.* at 4.

¹⁵⁴ *Id.* at 4-5.

the Anti-Deficiency Act for future violations.¹⁵⁵ The opinion affirmed the full measure of legislative control over expenditures and obligation of funds through the appropriations process.

Realizing that there were some valid exceptions, Attorney General Civiletti issued another opinion in 1981 describing types of activities that would be permissible during a lapse in funding.¹⁵⁶ These will be discussed in the next section in connection with a more recent U.S. Attorney General opinion.

C. Current Attorney General Opinion

At the request of the Office of Management and Budget (OMB), Assistant U.S. Attorney General Walter Delinger, issued an opinion, dated August 16, 1995, regarding the "permissible scope of government operations during a lapse in appropriations."¹⁵⁷

¹⁵⁵ *Id.* at 6 (Due to the uncertainty concerning application of the Anti-Deficiency Act and Congress' ratification of past obligations... "criminal sanctions would be inappropriate for those actions. This Department will not undertake investigations and prosecutions of officials who, in the past, may have kept their agencies open in advance of appropriations.").

¹⁵⁶ 5 Op. Off. Legal Counsel 1 (Jan. 16, 1981) (Permissible activities included the following: 1) activities funded from a source that is not dependent on enactment of annual appropriations (e.g. multiyear appropriations and revolving funds), 2) activities authorized by statutes which expressly permit obligations in advance of appropriations, 3) activities "authorized by necessary implication from the specific terms of duties that have been imposed on, or of authorities that have been invested in, the agency," and 4) activities "necessarily incident to presidential initiatives undertaken within his constitutional powers").

¹⁵⁷ Government Operations in the Event of a Lapse in Appropriations, U.S. Department of Justice, Office of Legal Counsel, (Aug. 16, 1995) (Memorandum for Alice Rivlin, Director, Office of Management and Budget, written by Asst. Attorney General Delinger of the Department of Justice for the Office of Management and Budget), [hereinafter *Delinger Opinion*].

The opinion reaffirmed the conclusions of the 1981 Civiletti opinion, and considered the effect of the 1990 congressional amendment to 13 U.S.C. § 1342, which limits the "emergency" exception as it applies to the use of federal employees during a shutdown.¹⁵⁸ It was his opinion that while a lengthy appropriations lapse could restrict the scope of some government activities, it would not result in the total shutdown of governmental activities. The Delinger Opinion attributes this to the fact that some significant areas of government spending would remain unaffected by just such a lapse.¹⁵⁹ Following are the guidelines for dealing with the situation that arises when a funding gap occurs. Of course, any department or agency whose regular appropriation has been signed into law would not have to curtail operations.

1. Fund Sources Not Requiring Enactment of a New Appropriation

Activities whose funds are not dependent on enactment of annual appropriations may award contracts, and continue to function under any already awarded contracts. This applies to activities funded by multi-year appropriations (e.g., DoD Procurements, RDT&E, and Military Construction), indefinite appropriations (e.g., Social Security entitlement programs), and revolving funds.¹⁶⁰ Department and agency operations needed to carry out the programs that are funded with multi-year or indefinite

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ 5 Op. Off. Legal Counsel 1 (Jan. 16, 1981) ("Payments, and the performance of contract obligations, under no-year and multiyear appropriations remain available for those purposes." "Social Security is a prominent example of a program that operates under an indefinite appropriation. In such cases, benefit checks continue to be honored by the treasury, because there is no lapse in the relevant appropriations.").

appropriations would also continue, during a funding gap, if linked to essential programs. Therefore any costs involved with writing or distributing Social Security checks, including the personnel needed to carry out these activities, would continue to be funded even in the absence of an appropriation or a continuing resolution.¹⁶¹ An already awarded annually funded contract may continue into a funding gap period. The same is true for a non-severable service contract that is properly awarded prior to the funding gap. It too may continue into the subsequent fiscal year.¹⁶² Continuation of each action noted above is not dependent on the enactment of a new appropriation.

2. Obligations Expressly Authorized By Law

Certain agencies have express contract authority from Congress to carry on emergency activities.¹⁶³ Contract authority is a limited form of budget authority that permits agencies to obligate funds in advance of appropriations, but does not authorize disbursements. Funds must be appropriated to liquidate obligations incurred under this authority. Both the Department of Defense (DoD) and the Coast Guard may contract

¹⁶¹ *Id.* at 7. (The opinion did not expressly consider whether the full cadre of attendants should be implied or whether some functions of the Social Security Administration not directly related to current disbursement of benefits might close down temporarily); *See also* (U.S. Office of Management and Budget. Office of the Deputy Director for Management. Washington, D.C., (Jan. 4, 1996) (During the second shutdown of fiscal year 1996 both the Social Security Administration and the Veterans Affairs were without enacted appropriations. However, both agencies were able to exempt a high percentage of their employees from furlough. For the Social Security Administration 56,000 of their 66,000 work force were not furloughed. The Veterans Affairs office retained 203,000 of their 235,000 workers).

¹⁶² *See* 10 U.S.C. § 2410a (1983); 41 U.S.C. § 2531 (1987).

¹⁶³ The Army Corps of Engineers' Continuing Contracts, 56 Comp. Gen. 437 (1977), B-187278.

for "necessary clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies," even in the absence of a current appropriation, without violating the Anti-Deficiency Act.¹⁶⁴

3. Obligations Necessarily Implied By Law

The Anti-Deficiency Act contemplates that some government functions, funded with annual appropriations, will continue despite a general appropriations lapse.¹⁶⁵ This is particularly true where the "lawful continuation of other activities necessarily implies that these functions will continue as well."¹⁶⁶ For example, Congress has impliedly authorized the staffing of Social Security positions by annually funded workers, to maintain the activity of printing and disbursing Social Security benefits to eligible individuals.¹⁶⁷ The Delinger Opinion also recognized that federal agencies may lawfully incur minimal obligations in advance of appropriations in order to terminate activities that may not legally continue during a general appropriations lapse.¹⁶⁸

4. The President's Core Constitutional Duties

The Anti-Deficiency Act permits the President to lawfully incur obligations during a general appropriations lapse when the obligations relate to functions instrumental to the

¹⁶⁴ 41 U.S.C. § 11 (1987).

¹⁶⁵ *Supra* note 53.

¹⁶⁶ 5 Op. Off. Legal Counsel 1 (Jan. 16, 1981).

¹⁶⁷ *Delinger Opinion*, *supra* note 157.

¹⁶⁸ *Id.* (Agencies may perform those activities necessary for the orderly shutdown of non-excepted activities within each agency).

President's discharge of constitutional powers. Obligations incurred in undertaking these functions are viewed as "authorized by law." The specific functions have not been listed, but depend upon the facts and circumstances surrounding the proposed activity. The valid assertion of this authority will typically be marked by both "urgency and necessity".¹⁶⁹

5. The Emergency Exception

As discussed earlier, the Anti-Deficiency Act prohibits employees from accepting voluntary services or employing personal services, during a lapse in appropriations, except in the event of an emergency affecting the safety of human life or the protection of property.¹⁷⁰ For many years this emergency exception was widely used by agencies to justify extensive governmental activity during funding gaps. In 1990 Congress amended the statute by narrowly defining an "emergency." According to the conference report that preceded this amendment, this part of the Anti-Deficiency Act was restricted to guard against "an overly broad interpretation of (Civiletti's) opinion ... regarding the authority for the continuance of government functions during the temporary lapse of appropriations, and affirm that the constitutional power of the purse resides with Congress."¹⁷¹ The amendment states in part, "Emergencies involving the safety of human life or the protection of property do not include ongoing regular functions of government, the suspension of which would not imminently threaten the safety of

¹⁶⁹ 5 Op. Off. Legal Counsel 1 (Jan. 16, 1981).

¹⁷⁰ 31 U.S.C. § 1342 (1983).

¹⁷¹ H.R. Rep. No. 964, 101st Cong., 2d Sess. 1170 (1990).

human life or the protection of property."¹⁷² To qualify as an emergency there must be some reasonable connection between the function to be performed and the safety of human life or protection of property, and there must be some reasonable likelihood that the safety of human life or the protection of property would be significantly compromised by delay in the performance of the function in question. This means that many of the functions in critical departments and agencies, such as the Defense Department, the FBI, the CIA, Drug Enforcement Administration, and federal jails, could continue to operate during a funding gap while non-essential functions of these, and other agencies, would have to be curtailed. However, within those departments, programs necessary for the safety of human life or protection of property would continue.

D. Availability of Funds Clause

Agencies may initiate certain contracting actions prior to an appropriation if the solicitation and contract includes the appropriate "Availability of Funds" clause.¹⁷³ The clause states that the, "Government's obligation under this contract is contingent upon the availability of appropriated funds from which payment for contract purposes can be made."¹⁷⁴ This clause must be included in a contract to be given effect as it will not be

¹⁷² Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388, (codified as amended in 31 U.S.C. 1342 (1990)).

¹⁷³ FAR § 52.232-18.

¹⁷⁴ *Id.*; See also FAR § 52.232-22, "Limitation of Funds" clause.

incorporated by operation of law.¹⁷⁵ Requirements and indefinite quantity contracts, properly funded by annual appropriations, may extend into the next fiscal year if the agency orders specified minimum quantities in the initial fiscal year, and the contract incorporates the proper language concerning "Availability of Funds for the next fiscal year."¹⁷⁶ Generally the contractor may not properly be ordered to continue to perform work until funds are available.

¹⁷⁵ C.R. Hartgraves, Comp. Gen. Dec. B-235086 (Apr. 24 1991) (unpublished) (Here the government created an Anti-Deficiency Act violation because the "Availability of Funds" clause was not in the contract, and will not be read into a contract under the "Christian" doctrine).

¹⁷⁶ FAR § 52.232-19; DFARS § 237.106(2)(iv).

Chapter V. Direction Concerning Permissible Government Operations

During a Funding Gap

It is difficult for an agency to plan for a funding gap because it cannot predict when such a gap will occur, or estimate its duration. Because of the associated uncertainties, disruption of work and loss of efficiency, both within the government and among contractors, is to be expected.¹⁷⁷

A. Direction from the Office of Management and Budget

An immediate concern when faced with an impending government-wide shutdown is the need to identify which governmental functions and employees are "essential," and therefore must continue despite a funding gap. Since the 1990 amendment to the Anti-Deficiency Act narrowed the "emergency" exception, fewer federal employees may legitimately be classified as "essential."¹⁷⁸ While many activities may continue despite a lapse in appropriations, activities that would not fall within one of the recognized exceptions, should be promptly brought to a close to avoid the risk of violating the Anti-Deficiency Act.¹⁷⁹

The Office of Management and Budget (OMB) has the responsibility of issuing instructions to the agencies concerning implementation of a federal shutdown, including

¹⁷⁷ *Supra* note 10.

¹⁷⁸ *Delinger Opinion supra* note 157.

¹⁷⁹ 6 Op. Off. Legal Counsel 555 (1982).

the furloughing of "non-essential" federal employees.¹⁸⁰ Some of this guidance is contained in OMB Circulars. For example, OMB Circular 80-14 explains which governmental functions and category of employees are to be considered "essential," and therefore retained during a shutdown. Agencies may only perform certain activities during a shutdown; 1) excepted activities, i.e., those necessary to ensure against an imminent threat to public health and safety, or the protection of property, and 2) those necessary for the orderly shutdown of non-exempted activities of the agency. Using this guidance, agencies are required to determine which activities and personnel should

¹⁸⁰ Memorandum from the Director of OMB to the Heads of Executive Departments and Agencies: Agency Operations in the Absence of Appropriations. Office of Management and Budget. OMB Circular 80-14, Wash. Sep. 30, 1980, at 1 & 2. Examples of excepted services and activities included the following:

Providing for the national security, including the conduct of foreign relations essential to the national security or the safety of life and property; Providing for benefit payments and the performance of contract obligations under multi-year or other funds remaining available for these purposes; Conducting essential activities to the extent that they protect life and property including medical care of inpatients and emergency outpatient care, activities essential to ensure continued public health and safety, including safe use of food, drugs, and hazardous materials; The continuance of air traffic control and other transportation safety functions and the protection of transport property; Border and coastal protection and surveillance; Protection of federal lands, buildings, waterways, equipment and other property owned by the United States; Care of prisoners and other persons in the custody of the United States; Law enforcement and criminal investigations; Emergency and disaster assistance; Activities that ensure production of power and maintenance of the power distribution system; Activities essential to the preservation of the essential elements of the money and banking system of the United States, including borrowing and tax collocation activities of the Treasury; and Activities necessary to maintain protection of research property.

continue working despite a shutdown, develop contingency plans to conduct an orderly shutdown, and train their employees how to implement their plan.¹⁸¹

Essential federal employees are those individuals designated by an agency office who will be involved in shutdown activities or will be performing excepted activities when the agency is shutdown. They are expected to continue to perform "emergency" functions during an appropriations lapse, and are guaranteed to be paid. However, they "may not receive an actual payment of money from the Treasury unless an appropriation is enacted."¹⁸²

The American Federation of Government Employees filed suit in the Washington D.C. District Court during the November 1995 shutdown challenging the government's continued activity, in light of the Anti-Deficiency Act.¹⁸³ The Union sought an injunction to stop the Executive Branch from requiring "essential" federal employees to work without pay during the fiscal year 1996 lapse in appropriations. U.S. District Judge Emmet G. Sullivan, refused to grant the request expressing concern that granting

¹⁸¹ 5 Op. Off. Legal Counsel 1 (Jan. 16, 1981). The Attorney General, noting that it would not be feasible to provide an advance listing of all "emergency" functions for each agency, made the following recommendation:

"I would recommend that, in preparing contingency plans for periods of lapsed appropriations, each government department or agency provide for the Director of the Office of Management and Budget some written description, that could be transmitted to Congress, of what the head of the agency, assisted by its general counsel, considers to be the agency's emergency functions."

¹⁸² Testimony of Walter Delinger, Assistant Attorney General, Office of Legal Counsel, Before a Joint Hearing of the Senate Budget Committee and the House Budget Committee, (unpublished), Sep. 19, 1995.

¹⁸³ American Federation of Government Employees v. Rivlin, Civ. A. No. 95-2115, 1995 WL 697236 (D.D.C. 1995).

such an injunction would be devastating, at least, and catastrophic at worst and propel the government into predictable chaos.¹⁸⁴ By refusing to grant the injunction, the court upheld the government's right to require "essential" employees work in a non-pay status despite a shutdown. However, it is important to note that an extended shutdown could create a problem for the government. The government may find itself depending upon the goodwill of its "essential" employees, to keep important governmental functions operational, with no way to compensate them. If faced with such a desperate situation, Congress would be hard pressed not to pass legislation to keep the government intact.

B. Shutdown Process

In late July 1995, OMB Director Alice Rivlin directed agencies to defer action on furloughs or other cutback actions pending completion of a government-wide plan.¹⁸⁵ At the same time, White House Chief of Staff Leon Panetta requested that agencies submit contingency plans for shutting down the government for possibly as long as two months.¹⁸⁶ On August 22, 1995, Ms. Rivlin rescinded her earlier memorandum, directing agencies to, "review their contingency shutdown plans, conform them to the

¹⁸⁴ *Id.*; Marianne Dyriakos and Philip P. Pan, *Federal Workers Are Seeing Red Ink*, Wash. Post, Jan. 3, 1996, at A4.

¹⁸⁵ Memorandum for Heads of Executive Departments and Agencies: Planning in Light of Appropriations Actions, Office of Management and Budget, Wash. Jul. 26, 1995.

¹⁸⁶ Ann Devroy and Stephen Barr, *Panetta Asks Agencies for Contingency Plans on Federal Shutdown*, Wash. Post, Jul. 29, 1995, at A7.

Delinger ruling, and promptly submit them to OMB."¹⁸⁷ By September 19, 1995, contingency plans had been received from virtually all agencies.¹⁸⁸ On November 9, 1995, OMB issued a memorandum advising all departments and agencies that a shutdown was likely.¹⁸⁹ The memorandum provided general guidance on what should be done each day to prepare for efficient implementation of shutdown plans on November 14, should a continuing resolution not be passed. When the continuing resolution failed to pass, OMB directed agencies to implement their shutdown plans.¹⁹⁰ During the next several months, OMB continued to provide guidance and direction to the various departments concerning their operation in the absence of appropriations.

C. Department of Defense (DoD) Contingency Plan

The DoD prepared a 1995 contingency plan according to OMB directives.¹⁹¹ This plan identified "exempt" and "non-exempt" activities and personnel, and how each would be affected by a federal government shutdown. The DoD plan had two listed

¹⁸⁷ Agency Plans for Operations during Funding Hiatus, Office of Management and Budget, Wash. Aug. 22, 1995.

¹⁸⁸ Testimony of Alice M. Rivlin, Director, Office of Management and Budget, Before a Joint Hearing of the Senate Budget Committee and the House Budget Committee (unpublished), Sep. 19 1995, at 3.

¹⁸⁹ Memorandum for Heads of Executive Departments and Agencies. Planning for Agency Operations, Office of Management and Budget, Nov. 9, 1995.

¹⁹⁰ Memorandum for Heads of Executive Departments and Agencies. Agency Operations in the Absence of Appropriations, Office of Management and Budget, Nov. 14, 1995.

¹⁹¹ Deputy Secretary of Defense, John P. White, *Memorandum for Secretaries of the Military Departments: Suspended Operations of the DoD in the Absence of an Appropriation - DoD Contingency Plan*, Sep. 26, 1995.

objectives: protection of national security and protection of military and civilian personnel "to the maximum extent permitted by fiscal law."¹⁹² The DoD plan included 15 general categories, and listed activities within those categories, that were either "exempt" or "non-exempt" from shutdown.¹⁹³ Classification as "mission essential" did not automatically require placement of a program or individual in the "exempt" category. The DoD contingency plan gave detailed guidance to cover a wide variety of activities, but provided field commanders with broad discretion to decide what activities in their areas were "exempt." For contracting activities, general advice was given that simply stated, "Contracts can be written for exempt functions." It was up to each commander to refer to other parts of the plan to determine what was, and was not permitted. Local commanders were given final decision authority for activities not specifically addressed in the contingency plan, but were cautioned to guard against "an overly broad interpretation of exempted National Security activities."¹⁹⁴ They were further advised that their furlough decisions could be subject to review and audit.¹⁹⁵

Overall, the shutdown had little effect on DoD or its contractors primarily because it lasted such a short period of time. The DoD contingency plan was implemented on

¹⁹² *Id.*

¹⁹³ *Id.* (The general categories included: National Security; Military and Civilian Personnel; Protection of Life and Property; ADP and Communications; DoD Medical/Dental Care; Education; Recruiting; Permanent Change of Station and Temporary Duty; DBOF/Other Revolving Funds; Contracting Activities; Legal Activities; Audit and Investigation Community; Trust Funds; Morale Welfare & Recreation/NonAppropriated Funds and; Financial Management).

¹⁹⁴ Operations in the Absence of FY 1996 Appropriations, Message from Deputy Secretary of Defense, Wash., Nov. 14, 1995.

November 14, 1995 with the expiration of continuing resolution H.J. Res. 108 (P.L. 104-31). In less than a week the shutdown ended for DoD with the signing of H.J. Res. 122 (P.L. 104-56).¹⁹⁶

This is not to say there were no problems. An Air Force "After Action Report" noted that the "uncertainty over whether people, workload, or both were exempt caused a wide disparity among the commands." The report stressed the need for clearer guidance on what constitutes "exempt activities and employees."¹⁹⁷ For example, the contracting officer at one Air Force base in the North East (Dover AFB) determined that all of their civilian employees were non-exempt, while another contracting office at a base in Maryland (Andrews Air Force Base) determined that 2/3 of their civilian employees were non-exempt.¹⁹⁸ Consistent with the DoD contingency plan, contract administration (except for exempted functions), supervision, and inspection of ongoing construction contracts ended until the first shutdown was over.¹⁹⁹ As a result, some funded contractors continued to work without surveillance at some locations while other

¹⁹⁵ *Id.*

¹⁹⁶ The appropriation bill which actually funded the Department of Defense for the remainder of fiscal year 1996 was passed by P.L. 104-61; 109 Stat. 636 (1995).

¹⁹⁷ Memorandum from Secretary of the Air Force, Financial Management Branch. *Shutdown Impact Update*. Nov. 1995.

¹⁹⁸ Interview with Lt Col Newsome, Contracting Officer, Andrews Air Force Base, (May 1996).

¹⁹⁹ Deputy Secretary of Defense, John P. White, *Memorandum for Secretaries of the Military Departments: Suspended Operations of the DoD in the Absence of an Appropriation - DoD Contingency Plan*, Sep. 26, 1995.

agencies directed their contractors to stop work.²⁰⁰ In addition, some federal personnel were unavailable to process checks, delaying contractor payments from several weeks to a month. However, none of the contractors at Andrews AFB, were required to furlough any workers or stop work.²⁰¹ Had the shutdown continued, the affect could have been much different. The inability to obligate new current year money would have delayed numerous acquisitions in the procurement process. In addition, as prior year funds were depleted, agencies would be required to further shutdown operations. Delayed review of contractor submittals, e.g. materials, schedules, payrolls, etc., would result in contractor claims and increased costs.

The Environmental Protection Agency, citing OMB's direction that agencies only perform 1) excepted activities (those necessary to ensure against an imminent threat to public health and safety, or the protection of property) or 2) those necessary for the orderly shutdown of non-excepted activities of the agency, developed their own plan for dealing with shutdowns.²⁰² They defined essential personnel as "those individuals designated by an agency office who will be involved in shutdown activities and performing excepted activities when the agency is shut down for an appropriation hiatus." Individuals performing shutdown activities were expected to continue to report to work for up to 5½ days, until all shutdown activities were completed. Those performing excepted activities were expected to continue to report to work, even in the

²⁰⁰ *Supra* note 198

²⁰¹ *Id.*

²⁰² EPA Contract Management Manual, Agency Shutdowns (Draft memorandum on file with author).

absence of an appropriation. Non-essential personnel (those not performing shutdown or excepted activities) were to be dismissed no later than 12:00 p.m. on the first workday of a fiscal year absent an appropriation or a continuing resolution. An inventory of excepted employees and contract activities was to be compiled. In addition, contracting officers were to issue stop-work orders to all on-site contractors who were not performing excepted activities. Off-site contractors, although legally able to continue to perform non-excepted activities under existing contracts for which the non-severable work had been fully funded, were also ordered to stop-work because of the agency's inability to monitor contractor performance.

D. Congressional Oversight

The House Committee on Government Reform and Oversight conducted their own review of the November 1995 shutdown.²⁰³ That committee questioned the shutdown implementation policy and the adequacy of agency contingency plans submitted to OMB. They noted discrepancies in the composition and scope of agency contingency plans as well as inconsistencies in retaining and furloughing employees who seemed to be performing similar functions.²⁰⁴ As an example they cited the Mine Safety and Health Administration which kept more than 1,400 safety inspectors on duty, while the Occupational Safety and Health Administration retained only 250 inspectors.²⁰⁵ The

²⁰³ *What's Essential?* *Supra* note 13.

²⁰⁴ *What's Essential?* *Supra* note 13 (Statement William F. Clinger, Jr., Chairman, House Committee on Government Reform and Oversight).

²⁰⁵ *Id.*

committee, evidencing its dissatisfaction with the process, issued a press advisory stating, "Despite the advanced planning, the execution of the shutdown was disorganized and illogical at best and chaotic in other instances."²⁰⁶

²⁰⁶ U.S. Congress. House. Committee on Government Reform and Oversight. *What's Essential in a Government Shutdown?* Media Advisory. Washington, Dec. 5, 1995, p. 1-2.

Chapter VI. Shutdown

A. As A Sovereign Act

The sovereign act doctrine traditionally provides that the government will sometimes take actions designed to further general public ends, and thus cannot be held liable by a contractor for resulting damages.²⁰⁷ The rationale for the government's immunity from liability for its sovereign acts was explained in 1865 by the U.S. Court of Claims when they said, "Whatever acts the Government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contract into which it enters with private persons."²⁰⁸ As a sovereign, the government can claim its responsibilities as a contractor are superseded by its obligations as a sovereign nation.²⁰⁹

In judging whether a government act is a sovereign act or a contractual act, courts have focused upon whether the act was directed at a particular contractor (or group of contractors) or at the public in general.²¹⁰ A later case looked to whether the action was

²⁰⁷ *Horowitz v. United States*, 267 U.S. 458, 461 (1925) (In this case a Railroad Administration embargo delayed a silk shipment. The court stated, "The United States when sued as a contractor, cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign.").

²⁰⁸ *Jones v. United States*, 1 Ct. Cl. 383 (1865).

²⁰⁹ *Glasgow Assocs. v. United States*, 203 Ct. Cl. 532, 495 F.2d 765 (1974).

²¹⁰ *Supra* note 207.

taken in the national interest and had a public and general application.²¹¹ Still another case looked to see if the action affected the public generally and was not directed solely toward a particular contractor.²¹² If the government can successfully argue that it was acting as a sovereign, it will not be liable for damages claimed by a contractor.

A Government directive that ties the hands of the Contracting Officer may be viewed as a sovereign act.²¹³ In a recent case, the United States Army entered into a requirements contract for the repair and maintenance of Army tanks. According to the contract, the contractor was to receive a minimum of 10 service calls per month. After only one month Desert Storm began, disrupting normal operations. The contracting officer advised the contractor that "the Pentagon has determined that it will now have the maintenance of the tanks done on site in Saudi Arabia." Accordingly, the contractor received no more service calls. All repairs were performed elsewhere. The contractor argued unsuccessfully that the government should be required to satisfy its minimum obligation of 10 service calls per month. The court disagreed, stating that this was in fact a sovereign act, releasing the government from its contractual obligations. In the absence of an express government warranty, a sovereign act that disrupts contract

²¹¹ Hedstrom Lumber Company v. United States, 7 Cl. Ct. 16 (1984).

²¹² Old Dominion Sec., ASBCA No. 40062, 91-3 BCA ¶ 24,173.

²¹³ Hills Materials Co., ASBCA No. 42410, 92-1 BCA ¶ 24,636, *reversed and remanded* on other grounds, Hills Materials Co. v. Rice, 982 F.2d 514 (Fed. Cir. 1992) (In this case the contractor's performance costs increased due to a change in excavation safety standards issued by the Occupational Safety and Health Administration (OSHA). The contractor characterized this change as "interference." While the Board agreed that this may have interfered with the contractors performance, the contractor was not allowed recovery of the additional costs because the Board found the government's actions to be a sovereign act.

performance, may entitle the contractor to an extension of the time for performance, but not to a contract price adjustment.²¹⁴

B. Actions That May Cause a Shutdown To Be Viewed as a Contractual Act

This author has no knowledge of any agency or department ever using the sovereign act doctrine as a basis to deny a contractor's requests for equitable adjustments following a government shutdown. This is likely due to the fact that so few matters involving shutdowns make it to the Boards or Courts. Most cases are administratively settled. In addition, the government may be reluctant to press the sovereign act issue because of the conduct of individual contracting officers. As explained later in this section, the government's actions may turn what otherwise may have been a sovereign act into a contractual act, requiring the government, by contract provision, to reimburse the contractor for breach of contract damages.²¹⁵ In such a case, government liability stems from its contractual capacity. The government has an implied obligation to cooperate with its contractors and not administer contracts in a manner that unnecessarily hinders, delays, or increases the cost of performance.²¹⁶

In *United States v. Winstar Corp.*, 116 S.Ct. 2432 (1996) the United States Supreme Court determined that the sovereign acts doctrine did not relieve the government from

²¹⁴ Carl W. Linder Co., Eng. BCA 3526, 78-1 BCA ¶ 13114.

²¹⁵ *Hughes Communications Galaxy, Inc. v. United States*, 998 F.2d 953 (Fed. Cir. 1993) (where government may waive sovereign act defense).

²¹⁶ *R&B Bewachungsgesellschaft mbH*, ASBCA No. 42213, 91-3 BCA ¶ 24,310 (In this case, government criminal investigators were seen to have taken action in a contractual capacity, not sovereign capacity).

liability where it had specially undertaken to perform an act from which it later sought to be excused. In this case, numerous Savings and Loan (S&L) institutions entered into contracts with the Government under which they were to take over failed thrifts. As part of their agreement with the government the S&L's obtained the right to treat the "supervisory goodwill" of acquired thrifts as intangible assets for accounting purposes. Congress subsequently enacted a statute prohibiting the use of any accounting treatment for "supervisory goodwill, effectively eliminating this contractual right. The Supreme Court rejected the Government's contention that they were shielded from liability finding that the Government had breached its contracts with the S&Ls. The Supreme Court found that the statute, enacted by Congress, was not a "public and general act" of the sort that would permit the Government to escape liability under the sovereign acts doctrine, but instead was "tainted by a governmental object of self-relief." The government was found to have abrogated the essential bargain of the contract.²¹⁷

1. Contracting Officer Action

While there may be legitimate governmental reasons for a shutdown, acts of individual contracting officers may establish that the conduct was contractual in nature. This is true because government direction, in the form of stop-work orders or suspension of work, may actually strengthen individual contractor's claims. During the fiscal year 1996 shutdown, companies working for government agencies that took the hardest line with contractors appear to be in the best position to recover their costs.

²¹⁷ United States v. Winstar Corp., 116 S. Ct. 2432, 2439 (1996).

According to one report, contractors who worked for EPA "are in great shape for recovering shutdown related expenses. Immediately after the shutdown EPA issued stop-work orders to almost all of their contractors. This practically ensures these contractor's ability to file for, and recover, some costs."²¹⁸ As predicted, numerous contractors did submit claims against the government for the cost and schedule affect of this shutdown.²¹⁹ By invoking the various contract clauses (stop-work orders, suspension-of-work orders, or government delay of work), a government contracting officer ensures the contractor some form of contractual relief.²²⁰

In *Empire Gas Engineering Company*,²²¹ the Armed Service Board of Contract Appeals rejected the government's sovereign act defense and held that a suspension of work order, although based upon an alert arising from a crisis in Lebanon, was a contractual act for which the contractor could recover his increased costs. In a 1978 case a contractor was to repair, clean, and paint the American Embassy in Iran. Two months into the contract, the contracting officer advised the contractor that the State

²¹⁸ Bill Murray, *Vendors Face Furlough Alone*, Wash. Technology, Feb. 8, 1996 at 30.

²¹⁹ Interview with Edward Murphy, Chief Procurement Policy Branch, EPA, Washington D.C. (May 1996) (According to Mr. Murphy, virtually every contractor that worked for EPA filed a claim following the fiscal year 1996 shutdown. He was unwilling to specify the number or dollar amount of these claims).

²²⁰ Federal Contracts Report, *EPA Taking Hard Stance on Contract Claims for Lost Wages Stemming From Shutdown*, Feb. 12, 1996, at 167 (There the Environmental Protection Agency advised contractors that costs associated with stop-work orders, issued during the shutdown, must be submitted in writing to contracting officer for consideration and may not be invoiced until there is an agreement concerning the equitable adjustment).

Department had learned of an impending domestic disturbance. Accordingly, the contracting officer issued a stop work order. Two days later the State Department issued a directive calling for the evacuation of all United States citizens from Tehran. In this case the Board allowed the contractor to recover his costs. While the directive from the State Department may have been a sovereign act, a contractual act in the form of a stop-work order from the contracting officer, came first.

2. Contracting Officer Inaction

In some cases government inaction may serve as a basis for recovery. Even if no formal contractual order is given (such as a stop-work or suspension of work order), a contractor may argue that he is entitled to recover due to a constructive suspension or failure to cooperate claim. This would be true if the contractor, through no fault of his own, had been locked out of a facility or was unable to proceed due to a lack of government personnel.²²² When the contractor's work is effectively suspended but the contracting officer does not issue an order of suspension, "the law considers that done which ought to be done" and characterizes the circumstances as a constructive suspension.²²³

²²¹ Empire Gas Engineering Co., ASBCA No. 7190, 1962 BCA ¶ 3323 (The Board found that issuance of a suspension order was a contractual act for which the contractor could recover).

²²² Summit Contractors, Inc. v. United States, 23 Cl. Ct. 333 (1991) (Absent specific warranty, contractor can not recover for site unavailability unless due to government's fault).

²²³ Merritt-Chapman & Scott Corp. v. United States, 192 Ct. Cl. 848, 429 F.2d 431 (1970) (Here there was a 14 month delay while the government determined how to cope with materially different subsurface conditions. The court found that under the

3. CO Discretion to Determine Contractor Status

A contracting officer, by taking some contractual action such as issuing a stop work order, could change what would otherwise have been viewed as a sovereign act into a contractual action.²²⁴ In a recent case a contractor, with a requirements contract for custodial services (daily cleaning of the walls, floors, and bathrooms), was issued a letter from the contracting officer which stated, "As a result of Operation Desert Storm, discretionary non-essential operations must be curtailed and the savings used to support Operation Desert Storm." The letter further advised that the cost savings from this reduction was to be reported to the Pentagon on a quarterly basis. The contractor was advised that the contracting officer had determined that his services were "non-essential." Accordingly, the custodial services were cut to once a week, reducing the contractor's revenue by 75%. The Board of Contract Appeals found this to be a contractual act since the contracting officer was the ultimate decision maker with discretion to determine which activities were essential and which were not. There was no specific direction from the government that would make this a sovereign act, therefore the contractor was permitted to recover his costs.

From a contractor's perspective, it is critical that all communications between the government and the contractor concerning contract performance (or non-performance)

circumstances, the contractor cannot reasonably be expected to bear the risks and costs of the delay). *See also* C.H. Leavell & Co. v. United States, 208 Ct. Cl. 776, 530 F.2d 878 (1976) (Government delay of five months awaiting a government appropriation to provide additional funding was found to be a compensable delay).

²²⁴ *Supra* note 220.

during the shutdown, be documented. These conversations may establish activity or conduct on the part of the government that would negate any sovereign act claim and fix responsibility, for any delay, on the government.

Chapter VII. More than the Original Contract Price

A contractor is entitled to receive an equitable adjustment or a simple adjustment if the parties' actions fall within specific remedy granting contract clauses. This chapter will briefly address those clauses and their applicability to a government shutdown.

A. Equitable Adjustments - Mechanism to Seek Performance Costs Plus Profit

The term "equitable adjustment" is well known in government contracting because of its significance in determining the measure of a contractor's recovery for changes which arise during contract performance.²²⁵ For such changes, a contractor may receive the additional costs of performance plus a reasonable and customary allowance for profit.²²⁶ The ASBCA noted that, "if there were no allowance of a profit which is fair under the circumstances, the Government would be getting something for nothing and the contractor would not truly be made whole."²²⁷ Profit is calculated as the rate earned on the unchanged work,²²⁸ a lower rate based on the reduced risk of equitable adjustments or the rate calculated using weighted guidelines.²²⁹

²²⁵ General Builders Supply Co. v. United States, 409 F.2d 246 (Ct. Cl. 1969).

²²⁶ United States v. Callahan Walker Constr. Co., 317 U.S. 56 (1942).

²²⁷ New York Shipbuilding Co., ASBCA No. 16164, 76-2 BCA ¶ 11979.

²²⁸ FAR § 15.903(f).

²²⁹ Doyle Constr. Co., ASBCA No. 44883, 94-2 BCA ¶ 26,832.

B. Basis for Equitable Adjustment

Where a specific clause permits an equitable adjustment, either party may seek the difference between the reasonable costs of performing the work as changed and the reasonable cost of performing as originally required.²³⁰ The party requesting the equitable adjustment has the burden of proof,²³¹ and must factually support his claim in order to recover.²³² He must establish both entitlement²³³ and causation.²³⁴ The cost incurred by the contractor must be reasonable.²³⁵ This of necessity involves an objective test which includes a review of the situation in which the contractor finds himself and the exercise of his business judgment.²³⁶ Where a contractor could reasonably have handled a changed condition with a less expensive method, the equitable adjustment

²³⁰ American Line Builders, Inc. v. United States, 26 Cl. Ct. 1155 (1992).

²³¹ Sayco, Ltd., ASBCA No. 38766, 94-3 BCA ¶ 27,254.

²³² Nager Electric Co. v. United States, 442 F.2d 936 (Ct. Cl. 1971) ("Just as the contractor has that task when an upward adjustment is sought under the Changes clause, so the government has the laboring oar, and bears the risk of failure of proof, when a decrease is at issue.").

²³³ Servidone Const. Corp. v. United States, 931 F.2d 860 (Fed. Cir. 1991) (The contractor must establish that the government did something that changed the contractor's costs, and is legally liable).

²³⁴ Boyajian v. United States, 191 Ct. Cl. 233 (1970) (In this case the court denied the claim because the contractor failed to relate specific additional costs to the alleged breach).

²³⁵ FAR § 31.201.3 ("A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business."); *See also* Techno Eng'g Constr., Ltd., ASBCA No. 41539, 94-1 BCA ¶ 26,340.

²³⁶ Bruce Const. Co. v. United States, 324 F.2d 516 (Ct. Cl. 1963).

will be adjusted downward to reflect what a reasonable contractor would have spent.²³⁷ Likewise, costs that a contractor would have incurred in any event, with or without a changed condition, are not reimbursable as part of an equitable adjustment.²³⁸ Actual incurred costs provide the best measure of a contractors costs.²³⁹ Failure to accumulate actual cost data may result in either a substantial reduction or total disallowance of the claimed costs.²⁴⁰ Estimates are an acceptable method of proving costs when they are supported by substantiating data and constitute the most accurate information available at the time.²⁴¹

C. Equitable Adjustment Clauses

As noted earlier, specific remedy granting clauses require the government to pay a contractor an equitable adjustment upon the happening of certain events. By taking contract action under any of these clauses, the government obligates itself to provide the specified contractual remedies, as long as the contractor satisfies his administrative requirements.

A number of the clauses require contractors to provide notice to the government of changes that could increase the government's liability. These requirements are meant to

²³⁷ *Roscoe-Ajax Const. Co. v. United States*, 458 F.2d 55 (Ct. Cl. 1972); *Hoffman v. United States*, 340 F.2d 642 (Ct. Cl. 1964).

²³⁸ *Dale Ingram, Inc. v. United States*, 475 F.2d 1177 (Ct. Cl. 1973).

²³⁹ *Cen-Vi-Ro of Texas, Inc. v. United States*, 210 Ct. Cl. 684, 538 F.2d 348 (1976).

²⁴⁰ *Delco Elecs. Corp. v. United States*, 17 Cl. Ct. 302 (1989).

²⁴¹ *Lorentz Bruun Co., Inc.*, GABCA No. 8504, 88-2 BCA ¶ 20,719.

protect the government. In some cases, the government may not be aware that a contractor has been delayed, or suffered an economic harm, until the contractor provides the required notification. For example, the standard "Changes" clause requires the contractor to assert its right to an adjustment within 30 days after receipt of a written change order.²⁴² The "Changes" clause for construction contracts, has a similar requirement in that the contractor must assert its right to an adjustment within 30 days of notifying the government that it considers a government action to be a change.²⁴³

Courts have not strictly construe the various notice requirements found in the clauses.²⁴⁴ Thus, even where contractors have failed to give notice they have still been allowed to pursue their claims. Normally contractor recovery will only be precluded if the government can establish actual prejudice due to a contractor's failure to give timely notice.²⁴⁵ With regard to shutdowns, the government wants to know of potential liability as quickly as possible. Soon after the second shutdown of fiscal year 1996 EPA threatened to disallow claims where FAR notice requirements were not strictly followed.²⁴⁶ Despite this threat, EPA accepted and processed all claims that were

²⁴² FAR § 52.243-1.

²⁴³ FAR § 52.243-4(b); FAR § 52.243-4(e).

²⁴⁴ *Copco Steel & Engineering Co. v. United States*, 169 Ct. Cl. 601, 341 F.2d 590 (1965) ("Written notice provisions have frequently been held to be of no consequence where the conduct of the parties have made it clear that formal adherence would serve no useful purpose.")

²⁴⁵ *Watson, Rice & Co.*, HUD BCA No. 89-4468-C8, 90-1 BCA ¶ 22,499.

²⁴⁶ *Supra* note 36.

filed.²⁴⁷ The specific clauses that allow equitable adjustments, and their applicability to a government shutdown, are discussed below.

1. Differing Site Conditions (FAR § 52.236-2)

This clause requires the contracting officer make an equitable adjustment to the contractor for differing site conditions that “cause an increase or decrease in the contractor’s cost of, or the time required for, performing any part of the work under [the] contract...” The contractor is required to promptly give written notice of the conditions in order to claim recovery. This clause has limited applicability in the context of a government shutdown.

2. Stop Work Order (FAR § 52.242-15)

Under this clause the contracting officer may order the contractor to “stop all, or any part, of the work called for by [the] contract for a period of 90 days.” If the stop-work order results in an increase in the time required for contract performance or increases the contractor’s costs, the contracting officer is required to make an equitable adjustment in contract price or delivery schedule.²⁴⁸ This assumes that the stop-work order is not issued due to the contractor’s fault.²⁴⁹ The contractor is required to immediately comply with this request and take all reasonable steps to minimize costs allocable to the work

²⁴⁷ *Id.*

²⁴⁸ Tom Shaw, Inc., DOTCAB 2130, 90-1 BCA ¶ 22578.

²⁴⁹ Toombs & Co. v. United States, 4 Cl. Ct. 535 (1984), *aff’d*, 770 F.2d 183 (Fed. Cir. 1985) (An ordered suspension was justified because of contractor fault, but failure to lift the suspension after the problem was resolved made the matter compensable).

covered by the stoppage. The contractor is also required to assert his right to the adjustment “within 30 days after the end of the period of work stoppage.”²⁵⁰ This clause was widely used by many government agencies during the fiscal year 1996 shutdown. EPA, for example, used it to stop virtually all of their contractual activity.²⁵¹

3. *Changes (Supplies) (FAR § 52.243-1)*

This clause allows the contracting officer to, “at any time, by written order ... make changes within the general scope of the contract ...” in (1) drawings, designs, specifications..., (2) method of shipment or packing, and (3) place of delivery. If this change increases the contractor’s costs or time required for performance, he is entitled to an adjustment in price and/or delivery schedule. Conversely, if the change decreases his cost or time of performance, the contract price or completion time will be decreased. The contractor is required to assert a changes claim to the contracting officer “within 30 days from the date of receipt ... of the [notification of change].” Due to the listed limitations, this clause would have little applicability in the context of a government shutdown.

4. *Changes (Services) (FAR § 52.243-1, Alternate I)*

This clause is very similar to the above clause. It allows the contracting officer to, “at any time, by written order ... make changes within the general scope of the contract ...” in (1) description of services to be performed, (2) time of performance, and (3) place

²⁵⁰ FAR § 52.242-15 (b)(2).

²⁵¹ *Supra* note 219

of performance of the services. If this change increases the contractor's costs or time required for performance, he is entitled to an adjustment in price and/or delivery schedule. The contractor is required to assert a changes claim to the contracting officer "within 30 days from the date of receipt ... of the written order." This clause could be used to bring about in-scope changes to both time and place of performance.

Accordingly, it could be used to institute these type changes only if the shutdown is of limited duration. An attempt to use the changes clause to satisfy the government's need to limit contractor activity during a lengthy shutdown would likely make these changes out of scope.

5. *Changes (Cost Reimbursement Contracts) (FAR § 52.243-2)*

Under this type of contract the contractor is obligated to work until allocated funds have been expended. He is not obligated to continue performance or incur costs beyond the point established in the limitation of cost or limitation of funds clause in his contract.²⁵² Changes could be ordered to drawings, method of shipment and place of delivery. Several alternate clauses for services, supplies, and construction are also available. If the change increases the estimated cost of, or the time required for, performance the contractor can be provided an equitable adjustment in the estimated cost, delivery, completion schedule, and any associated fixed fee.. Like the previous clause, an attempt to use this clause to satisfy the government's need to limit contractor activity during a lengthy shutdown would likely make these changes out of scope.

²⁵² FAR § 52.243-2 (e).

6. *Changes (Construction) (FAR § 52.243-4)*

This clause allows the contracting officer to, “at any time, by written order ... make changes within the general scope of the contract ...” in (1) the specifications (including drawings and designs), (2) the method of performance of the work, (3) government-furnished facilities, equipment, materials, services or site, or (4) directing acceleration in performance of the work.” However, any order, action, or inaction of an authorized representative of the government that requires the contractor to perform extra work, or work different from that required by the contract, may be viewed as a constructive change. If a change increases the contractor’s costs or time required for performance, he is entitled to an adjustment in price and/or delivery schedule.²⁵³ As with the other “Changes” clauses, if contractor work is suspended, delayed, or disrupted by the change, the equitable adjustment may include unabsorbed overhead, calculated using the Eichleay formula.²⁵⁴ However, if the change simply adds extra work that takes more time to perform, extending the contract completion date, overhead is usually limited to a percentage markup.²⁵⁵ The clause requires the contractor to provide written notice to the government that a change has occurred. Except for claims of defective specifications, the contractor will not receive any adjustment “for costs incurred more than 20 days before the contractor gives written notice as required.” The contractor must assert its

²⁵³ FAR § 52.243-4 (d).

²⁵⁴ Wickham Contracting Co. v. Fischer, 12 F.3d 1574 (Fed. Cir. 1994); (For a general summary of cases dealing with use of the Eichleay formula *see* Kaufman & Holman, the Eichleay Formula: A resilient Means for Recovering Unabsorbed Overhead, 24 Pub. Cont. L.J. 343 (1995)) (Discussed in greater detail at Chapter X).

right to an adjustment “within 30 days from the date of receipt of [notification of change].”

7. *Government Furnished Material or Property (FAR § 52.245-2, -4, -5, and -7)*

Government furnished property (GFP) is defined as “property in the possession of or directly acquired by the government and subsequently made available to the contractor.”²⁵⁵ This clause is very relevant to a shutdown. The government’s failure to timely furnish contractually required GFP entitles the contractor to an equitable adjustment in contract price for his increased costs.²⁵⁷ If the failure to furnish GFP delays or disrupts performance of the contract, the time for performance may be extended.²⁵⁸ Where the delay causes a contractor’s failure to perform, that failure will be considered excusable, and the contractor will have the same right to recover the costs incurred in attempting to perform as if the contract had been terminated for the Government’s convenience.²⁵⁹ For example, a contractor may recover for the increased costs of engineering efforts, labor inefficiencies, idle time, and over-time which result from delay in delivery of GFP.²⁶⁰ A contractor may justifiably suspend other operations, even though they are not directly affected by the government’s delay in

²⁵⁵ C.B.C Enters., Inc. v. United States, 978 F.2d 669 (Fed. Cir. 1992).

²⁵⁶ FAR § 45.101.

²⁵⁷ Fairchild Industries, Inc., ASBCA No. 15272, 74-1 BCA ¶ 10551; Drexel Dynamics Corp., ASBCA No. 9502, 66-2 BCA ¶ 5860.

²⁵⁸ International Aircraft Services, Inc., ASBCA No. 8389, 65-1 BCA ¶ 4793.

²⁵⁹ Woodside Screw Machine Co., Inc., ASBCA No. 6936, 1962 BCA ¶ 3308.

²⁶⁰ Sun Shipbuilding & Drydock Co., ASBCA No. 11300, 68-1 BCA ¶ 7054.

furnishing property, if it would serve no purpose to perform those other operations in the absence of the GFP.²⁶¹ However to recover for delayed GFP or to have an excuse for default, the contractor must show that the delay actually affected his performance.²⁶² With respect to delay, the contractor is required to provide timely written notice to the government. Failure to give notice will adversely affect contractor recovery when such failure results in prejudice to the government.²⁶³ In addition, requests for equitable adjustment raised for the first time after final payment will be considered untimely²⁶⁴ unless the government had constructive knowledge at the time of final payment.²⁶⁵

8. Inspections (FAR § 52.246-2, -4, -5, -9, -10, and -12)

The government inspects tendered supplies or services to insure that they conform with contract requirements. These clauses are remedy granting clauses, and vest the government and contractor with significant rights and remedies.²⁶⁶ The particular inspection clause found in a contract determines the parties' rights.²⁶⁷ While the

²⁶¹ A. Dubois & Sons, Inc., ASBCA No. 5176, 60-2 BCA ¶ 2750.

²⁶² Disan Corp., ASBCA No. 21323, 78-2 BCA ¶ 13528.

²⁶³ Reeves Instrument Co., ASBCA No. 11534, 68-2 BCA ¶ 7078.

²⁶⁴ Electro-Technology Corp., ASBCA No. 42495, 93-2 BCA ¶ 25,750.

²⁶⁵ Gulf & Western Indus. Inc. v. United States, 6 Cl. Ct. 742 (1984).

²⁶⁶ FAR § Part 46.

²⁶⁷ Depending upon the specific clauses in the contract, the government has the right to inspect the test supplies, services, materials furnished, work required by the contract, facilities, and equipment at all places and times, and, in any event, before acceptance. *See, e.g.*, FAR § 52.246-2 (supplies-fixed-price), -4 (services--fixed-price), -5 (services-cost-reimbursement), -9 (R&D), -10 (facilities), and -12 (construction).

inspection right is very broad, it is not without limits.²⁶⁸ Government inspections may give rise to equitable adjustment claims if they unreasonably delay the contractor's performance or cause him to perform additional work.²⁶⁹ In addition, the government can not unreasonably delay acceptance.²⁷⁰

Applicability to a shutdown scenario would be limited. A contractor would have to allege that the government's failure to timely inspect, or accept a contractor product, was unreasonable. If government inspectors were in fact unavailable due to a shutdown, inspection delays could be expected and would not be unreasonable absent some evidence of bad faith on the part of the government. Likewise a reasonable government delay in acceptance, in connection with a shutdown, would not result in any remedy for a contractor.

D. Adjustment Clauses

Two additional clauses serve as the contractor's authority to ask that the contract price be adjusted. These clauses differ from the equitable adjustment clauses, discussed above, in that the contractor may not use them to claim a profit on any of the work resulting from action taken in accordance with the clause. The contractor may be allowed to recover some direct and indirect costs associated with the contract action, but

²⁶⁸ *Baifield Indus., Div. of A-T-O, Inc.*, ASBCA No. 13418, 77-1 BCA ¶ 12,308 (Government test of cartridge cases at excessive pressure was found to be improper).

²⁶⁹ *CBI NA-CON, Inc.*, ASBCA No. 42268, 93-3 BCA ¶ 26,187. *See also*, *P & M Indus.*, ASBCA No. 38759, 93-1 BCA ¶ 25,471 (concerning government failure to resolve ambiguities involving inspection requirements in a timely manner).

²⁷⁰ *Cudahy Packing Co. v. United States*, 109 Ct. Cl. 833, 75 F. Supp. 239 (1948) (Unreasonable for government to take two months to reject a shipment of eggs).

no profit. These clauses have limited applicability to contractor recovery following a shutdown, but are discussed below.

1. Suspension of Work (FAR § 52.242-14) (Fixed Price Construction)

This clause provides the basis for paying a contractor for unreasonable government interruption or delay of work due to a government ordered suspension of work. It gives the contracting officer the authority to “Order the Contractor, in writing, to suspend, delay, or interrupt all or any part of the work of this contract for the period of time that the Contracting Officer determines appropriate for the convenience of the government.”²⁷¹ If the period of suspension, delay or interruption is the fault of the government, and is considered to be unreasonable, the contractor is entitled to a contract adjustment.²⁷² The adjustment does not, however, include profit.²⁷³ The contractor is not required to prove that the overall completion of the contract was delayed.²⁷⁴ The contractor will not be entitled to an adjustment if performance would have been suspended by any other cause, other than the government suspension. Nor is there any recovery under this clause for a suspension, delay, or disruption for which an equitable

²⁷¹ FAR § 52.242-14 (a); *See also* Tom Shaw, Inc., ASBCA No. 28596, 95-1 BCA ¶ 27,457.

²⁷² C&C Plumbing & Heating, ASBCA 44270, 94-3 BCA ¶ 27,063 (To recover for a suspension of work the contractor must prove that: contract performance was delayed, the government caused the delay through no fault of the contractor, the delay lasted an unreasonable length of time, and the delay caused the contractor to incur additional costs).

²⁷³ C.E.R., Inc., ASBCA No. 41767, 96-1 BCA ¶ 28029 (An adjustment shall be made for an increase in the cost of performance of this contract (excluding profit) necessarily caused by the unreasonable suspension, delay, or interruption).

adjustment is provided for or excluded under another clause of the contract.²⁷⁵ In addition, the contractor must give written notice to the government of anything it considers to be a constructive suspension within 20 days of the suspension, or risk not being paid for those costs.²⁷⁶ Virtually any type of cost is recoverable provided the contractor can establish that the cost would have not been incurred but for the suspension.²⁷⁷ Contractors have been allowed to recover overhead (both office²⁷⁸ and work site²⁷⁹); costs for idle time;²⁸⁰ increased costs of labor²⁸¹ & materials;²⁸² increased costs of performing during adverse weather conditions;²⁸³ and cost for loss of efficiency.²⁸⁴ This clause will provide relief for contractors, in a shutdown setting, only to the extent that the resulting suspension is considered to be unreasonable. It would therefore have applicability only during an extended shutdown.

²⁷⁴ Mega Const. Co., v. United States, 29 Fed. Cl. 396 (1993).

²⁷⁵ George A. Fuller Co., ASBCA No. 8524, 1962 BCA ¶ 3619; FAR § 52.242-14, para (b).

²⁷⁶ CCM Corp. v. United States, 20 Cl. Ct. 649 (1990); *See also* Merritt-Chapman & Scott Corp. v. United States, 192 Ct. Cl. 848, 429 F.2d 431 (1970) (When the contractor's work is effectively suspended but the contracting officer does not issue an order of suspension, "the law considers that done which ought to be done" and characterizes the circumstances as a constructive (or de facto) suspension).

²⁷⁷ R.C. Hedreen Co., ASBCA No. 20599, 77-1 BCA ¶ 12328.

²⁷⁸ Continental Consolidated Corp., ASBCA No. 10662, 67-1 BCA ¶ 6127.

²⁷⁹ Bruno Law, Trustee v. United States, 195 Ct. Cl. 370 (1970).

²⁸⁰ Merritt-Chapman & Scott Corp. v. United States, 528 F.2d 1392 (Ct. Cl. 1976).

²⁸¹ Keco Industries, ASBCA No. 15184, 76-2 BCA ¶ 9576.

²⁸² Samuel N. Zarpas, Inc., ASBCA No. 4722, 59-1 BCA ¶ 2170.

²⁸³ B.J. Lucarelli & Co., Inc., ASBCA No. 8422, 65-1 BCA ¶ 4523.

²⁸⁴ Algernon Blair, Inc., GSBCA No. 4072, 76-2 BCA ¶ 12073.

2. Government Delay of Work (FAR § 52.242-17) (Supplies - other than commercial or modified-commercial items)

Government delay, although not necessarily a breach of any obligation, is sometimes undertaken by the government for its own purposes and advantage without much regard for any possible harm to the contractor's effort.²⁸⁵ This clause provides that the contractor may be paid an adjustment in the contract price (excluding profit) for any increase in the cost of performance caused by (1) any act of the contracting officer in the administration of the contract, or (2) the contracting officer's failure to act within the time specified in the contract (or within a reasonable time if none is specified).²⁸⁶ This clause is more favorable to the contractor than the suspension of work clause because the contractor does not have to prove that the delay period was unreasonable. However, all other conditions imposed by the suspension of work clause (not the fault of the contractor, notice requirements, etc.) must be met. This clause, while limited to fixed-price contracts for supplies, could be used by those contractors to recover for delay costs attributed to a shutdown.

²⁸⁵ Excavation-Construction, Inc., Eng. BCA 3858, 83-1 BCA ¶ 16293.

²⁸⁶ *Supra* note 276.

Chapter VIII. Effect of Lapsed Appropriations on Particular types of Contracts

Most appropriations are available for only a limited period of time. The government must take the necessary steps to obligate its funds within this period of availability. If it fails to do so, the funds expire and are generally no longer available for obligation.²⁸⁷

With the exception of essential contract actions discussed in chapter IV, the government runs the risk of violating the Anti-Deficiency Act if it obligates funds in advance of an appropriation.²⁸⁸ The government often awards contracts with start dates that coincide with the beginning of the fiscal year. This practice invites fiscal problems when Congress delays passing appropriations acts and a funding gap occurs. The affect of a lapse in appropriations on various contract types is discussed below.

A. Fixed-Price Contracts

These contracts are typically used when the specifications are reasonably clear and definite and adequate competition is expected.²⁸⁹ The government must obligate the entire contract price on the date of contract award.²⁹⁰ If the contract is properly awarded prior to a funding gap, the government may allow the contractor to continue to perform under the contract. Any contract work that has not been awarded prior to a shutdown

²⁸⁷ 31 U.S.C. § 1553 (1983).

²⁸⁸ *Supra* note 53.

²⁸⁹ Delco Elec. Corp., B-244559, 91-2 CPD ¶ 391.

²⁹⁰ DoD Acct'g Manual 7220.9-M, ch. 25, para. D.1; DFAS-IN 37-1, tbl. 9-1.

may not be performed until adequate funding is obtained, through passage of the agencies applicable appropriations bill or a continuing resolution.

B. Service Contracts

Service contracts are presumed to be “severable” and hence a bona fide need of the fiscal year in which they are performed.²⁹¹ A bona fide need inquiry focuses on the timing of the obligation of funds and whether that obligation is for a current need of the government. Thus, as a general rule, service contracts may not cross fiscal years, and agencies must fund service contracts with dollars available for obligation on the date the contractor performs the services.²⁹² The government must use current funds to obtain current services.²⁹³ However, if the services produce a single or unified outcome, product, or report, the services are nonseverable (i.e., for a single undertaking with a definite final product). In which case, the government must fund the entire effort with dollars available for obligation at the time the contract is executed, and contract performance may cross fiscal years.²⁹⁴ A statutory exception permits DoD agencies to

²⁹¹ 31 U.S.C. § 1502 (a) (1983) (This statute, referring to a bona fide need, provides that the balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability and obligated consistent with section 1501 of this title. However, the appropriation or fund is not available for expenditure for a period beyond the period otherwise authorized by law).

²⁹² Matter of Incremental Funding of Multiyear Contracts, B-241415, 71 Comp. Gen. 428 (1992); DFAS-IN Reg. 37-1, tbl. 9-1.

²⁹³ 31 U.S.C. § 1502 (1983).

²⁹⁴ Incremental Funding of U.S. Fish & Wildlife Service Research Work Orders, B-240264, Feb. 7, 1994 (unpub.) (where work on an environmental impact statement

award contracts for a period not to exceed 12 months, at any time during the fiscal year, for maintenance of tools, equipment, and facilities, lease of real or personal property, depot maintenance, and the operation of equipment.²⁹⁵ Under this statute the government must obligate funds current at the time of award. These contracts may be completely funded with current appropriations, despite the fact that they extend into another fiscal year. Similar authority exists for non-DoD agencies (except Coast Guard and NASA) to award and fund, with funds current at the time of award, any service contract for a period not to exceed one year (exclusive of options) at any time during the fiscal year.²⁹⁶ As with other contracts, if a contract is properly awarded prior to the lapse in appropriations, work on the contract may continue as long as personnel are available to administer the contract.

C. Research, Development, Test and Evaluation (RDT&E) Contracts

Just as their name suggests, these contracts are used to fund scientific research, development, test, and evaluation, including maintenance and operation of these facilities and equipment. They typically are awarded with two year money. If contract award occurs prior to a shutdown, the contractor could continue operations, despite a shutdown, until the funds run out. This of course assumes that the effort is not viewed as severable.

properly crossed fiscal years); *See also* Proper Appropriation to Charge Expenses Relating to Nonseverable Training Course, B-238940, Feb. 25, 1991, 70 Comp. Gen. 296.

²⁹⁵ 10 U.S.C. § 2410a. (1983).

²⁹⁶ 41 U.S.C. § 2531 (1987).

D. Indefinite-Quantity/ Indefinite-Delivery Contract

Indefinite quantity contracts may legitimately cross fiscal years,²⁹⁷ however they must include an “availability of funds” clause.²⁹⁸ The government must purchase the minimum quantity up front, but may purchase up to the maximum quantity.²⁹⁹ Typically, the government issues additional delivery orders as needs arise.³⁰⁰ If funds are unavailable, due to a shutdown, the government would not be able to order additional work until funds become available. To do otherwise would violate the “in advance of appropriations” prohibition of the Anti-Deficiency Act.³⁰¹

E. Contract Options

Contract options are one means of ensuring continuity of a contractual relationship from fiscal year to fiscal year.³⁰² Upon proper exercise of an option the contract continues under the original contract terms.³⁰³ Each contract that contains option

²⁹⁷ FAR § 37.106.

²⁹⁸ FAR § 52.232-18 (Where administrative lead time requires contract award prior to the receipt of funds to ensure timely delivery of the goods or services. If a “subject to availability of funds” clause is used, the government is not to accept services or supplies until after receipt of funds); *see also* FAR § 32.703.

²⁹⁹ Federal Elec. Corp., ASBCA No. 11726, 68-1 BCA ¶ 6,834.

³⁰⁰ *Tennessee Soap Co. v. United States*, 130 Ct. Cl. 154 (1954).

³⁰¹ 31 U.S.C. § 1341 (a)(1)(B) (1983) (This, because the contract would be for the bona fide need of future fiscal years, for which funds are not yet available).

³⁰² *Contel Page Servs., Inc.*, ASBCA No. 32100, 87-1 BCA ¶ 19,540.

³⁰³ FAR § 17.201 (An option gives the government the unilateral right, for a specified time, to order additional supplies or services, or to extend the term of the contract, at a specified price).

periods must contain the “availability of funds” clause.³⁰⁴ This limits the government liability should funds be unavailable to award the next option period. If the government elects to exercise the option, it must obligate funds for each option period with the proper funds as they become available.³⁰⁵ If funds are unavailable, the government may not exercise the option until funds become available. The government may however, fund an option incrementally.³⁰⁶ During periods covered by a continuing resolution, the government may provide funding for the period of the continuing resolution.

³⁰⁴ FAR § 32.703-2; *Blackhawk Heating Inc. v. United States*, 622 F.2d 539 (Ct. Cl. 1980); *Contel Page Services, Inc.*, ASBCA No. 32100, 87-1 BCA ¶ 19,450.

³⁰⁵ *The Boeing Co.*, ASBCA No. 37579, 90-3 BCA ¶ 23,202; *See also Cessna Aircraft Co. v. Dept. of the Navy*, 744 F. Supp. 260 (D Kan. 1990).

³⁰⁶ *United Food Services, Inc.*, ASBCA No. 43711, 93-1 BCA ¶ 25,462 (In this case the government exercised its fourth year option for commissary stocking services and then, relying on the Availability of funds clause, began to incrementally fund the contract. The contractor claimed that the government’s actions breached the contract by exercising the option for a period not allowed by the terms of the option. The Board found that the government properly exercised the option, and properly applied the Availability of funds clause when it incrementally funded the contract. If the original contract contains the Availability of funds clause, the government may incrementally fund a properly exercised option. Funding the option in multiple increments did not void the option).

Chapter IX. Contractor Labor Costs

As a result of the shutdown a number of contractors were either directed to stop work, or were unable to continue working due to the absence of federal employees.³⁰⁷ In either case, contractors were required to decide what to do with their work force. Some contractors were able to keep their employees working on related projects, or were able to divert them to other tasks, despite the shutdown. Others were forced to furlough, or lay off their work force. The circumstances surrounding each incident are critical in determining whether the contractor's labor costs will be allowed.³⁰⁸ The government must ascertain the rational for the amount claimed and have adequate supporting data to determine that the request accurately reflects a reasonable adjustment to a contract. In addition, the contractor must have performed, and the government must have receive a benefit, in order for costs to be allowed as a direct charge.³⁰⁹

A. Personnel Paid Throughout the Shutdown

Some contractors continued to pay their employees despite the fact that they were unable to work on the underlying government contract. The government will likely treat these charges as idle labor, and refuse to pay this cost. This is particularly true if the contractor was issued a Stop-work order. As discussed earlier, such an order directs

³⁰⁷ *Supra* note 219.

³⁰⁸ Boubli Elec., Inc., ASBCA 34056, 89-3 BCA ¶ 22,094 (Here the contractor was unable to demonstrate that it was necessary to keep an employee on the payroll during an extended delay).

³⁰⁹ Oxwell, Inc., ASBCA 27119, 83-2 BCA ¶ 16,762, *recons. denied*, 84-2 BCA ¶ 17,412.

the contractor to minimize any costs incurred as a result of the stop-work order.³¹⁰ Part of the government's review will focus on whether the contractor exercised diligence in minimizing costs during the shutdown and startup. Labor costs for other employees who were used to work on matters related to the underlying contract (i.e. work on related filing or training specific to a government contract) may be recoverable based on the underlying circumstances.³¹¹ However, if directed to stop-work, the contractor should taken all reasonable steps to do just that.

B. Furloughed Personnel

Where a contract was delayed or suspended, the contractor may have elected to furlough some or all of his work force to mitigate and minimize costs. This course of action is expected when workers cannot be productively used.³¹² Following the fiscal year 1996 shutdown some contractors sought to recover the entire labor cost, with applicable burden, for all furloughed employees by establishing a payroll liability for furloughed employees that were not paid. If allowed, contractors would essentially be getting back pay for their furloughed employees. The government has refused to pay these claims, despite the fact that furloughed government personnel were retroactively

³¹⁰ FAR § 52.242-15.

³¹¹ Hardeman-Monier-Hutcherson (JV), ASBCA 11785, 67-1 BCA ¶ 6210 (In some cases, good business judgment will indicate that a contractor should keep labor available to continue performance of the work once the delay has ended. The cost of such idle labor is compensable subject to the normal analysis of the contractor's mitigation of damages).

³¹² *Id.*

paid.³¹³ There is no legal authority to provide furloughed contractor employee back pay. Since the contractor furloughed these employees, he was simply fulfilling his obligation to mitigate costs, resulting in no recovery of furloughed employees wages.³¹⁴

In some instances contractors allowed their employees to take vacations during this time rather than furlough them. This allowed the contractor to legitimately pay those employees accrued vacation pay. A number of contractors have now asked that the vacation entries be reversed, credited back to the employee, and the same days be retroactively changed to unapplied labor.³¹⁵ The government will likely rejected this request as well, relying on the contractors obligation to mitigate costs. Permitting employees, that otherwise would have been furloughed, to take vacations simply mitigated the government's costs.³¹⁶

³¹³ *Supra* note 29.

³¹⁴ Edward K. Dilworth, PSBCA 1205, 84-2 BCA ¶ 17,346 (Here severance pay for idled employees was included in a delay claim. The government properly denied this portion of the claim stating that payment would only be allowable pursuant to law, agreement or policy, none of which applied).

³¹⁵ *Supra* note 219.

³¹⁶ *Supra* note 308.

Chapter X. Other Costs

Many contractors experienced some type of delay due to the 1996 shutdown. Virtually all of the contractors that worked for the EPA were formally directed to stop work.³¹⁷ Others contractors, while not directed to stop work, were simply unable to conduct normal contract activities because they were physically locked out or otherwise denied access to their place of employment.³¹⁸ In addition, some contractors experienced payment delays, delays in approval of contractor drawings, equipment, or materials, formal or constructive suspension of work, and late government furnished property.³¹⁹ While delays are to be expected in the normal course of government contracting, to the extent they are caused by the government, the contractor may be entitled to compensation for related additional costs. Contractor recovery for a variety of costs related to a shutdown are discussed below.

A. Unabsorbed Overhead - The Eichleay Formula

A contractor may have legitimate costs that continue despite a delay or forced stop-work order. During this period of time his volume of work is reduced, unless he is able to obtain new replacement work, while his fixed overhead costs continue at the usual rate.³²⁰ Since it is often not practical to reduce the fixed costs that make up this overhead, (depreciation, plant maintenance, utilities, rent, insurance or salaries of home office staff, etc.) these costs continue

³¹⁷ *Supra* note 219.

³¹⁸ *Supra* note 39.

³¹⁹ *Supra* note 41.

at the same rate as before the delay, resulting in unabsorbed overhead.³²¹ Extended overhead refers to the situation in which the contract performance period is extended due to government caused delays. In this case the contractor continues to incur overhead costs on the delayed project for an extended period of time. Courts and boards have referred to unabsorbed overhead and extended overhead interchangeably.³²²

Contractors have successfully claimed unabsorbed/extended overhead for government caused disruptions, delays, suspensions, work stoppages and inability to use available manpower. It is reasonable for a contractor to expect compensation for this unabsorbed overhead. However, recovery of these costs is not automatic. A contractor must prove the government caused disruption in the relationship between his revenue and overhead costs.³²³

The formula adopted in *Eichleay Corp.*, ASBCA 5183, 60-2 BCA 2688, is the most commonly accepted method of determining the amount of home office overhead delay damages.³²⁴ The formula estimates the amount of unabsorbed overhead incurred due to a suspension or delay by (a) allocating home office overhead to a project on a volume basis, (b) calculating a daily overhead dollar rate, and (c) multiplying that rate by the number of days of delay.³²⁵ To recover, a contractor must establish that the government suspended, delayed, or disrupted the contract, that he (the contractor) was required to remain on "standby", and was

³²⁰ *Therm-Air Mfg. Co.*, ASBCA No. 15842, 74-2 BCA ¶ 10818, at 51,440-41.

³²¹ *Libby Corp.*, ASBCA No. 40765 et al., 96-1 BCA ¶ 28255.

³²² *Worsham Const. Co.*, ASBCA No. 25907, 85-2 BCA ¶ 18016.

³²³ *Beatty Elec. Co.*, EBCA 403-3-88, 91-2 BCA ¶ 23,687.

³²⁴ *Proserv, Inc.*, ASBCA 20768, 78-1 BCA ¶ 13,066.

³²⁵ *Mech-Con Corp. v. West*, 61 F.3d 883 (Fed. Cir. 1995).

unable to take on additional work.³²⁶ In addition, the contractor must do what he reasonably can to mitigate the effect of the delay, to include diverting workers to other projects if possible.³²⁷ The contractor may use an actual or constructive suspension, change, or differing site condition to establish the government caused delay. The contractor's work force need not be completely idle to meet the standby requirement.³²⁸ It is satisfied if some significant portion of the work is suspended or delayed and, as a result, the contractor is not able to accomplish as much work as he would have during that period.³²⁹ The burden then shifts to the government to establish that the contractor could have taken on other work during the period of delay.³³⁰ The contractor may also meet the standby test if the government requires the contractor to remain ready to perform, and the delay is for an uncertain duration.³³¹ This is because it is impractical

³²⁶ *Altmyer v. Johnson*, 79 F.3d 1129 (Fed. Cir. 1996).

³²⁷ *Harris & Covington Hosiery Mill, Inc.*, ASBCA No. 260, 4 CCF 60,806 (1949).

³²⁸ In *Williams Enters. v. Sherman R. Smoot Co.*, 938 F.2d 230, 235 (D.C. Cir. 1991), the D.C. Circuit rejected the argument that the Eichleay formula is only applicable to contract suspensions as opposed to contract extensions. The court stated, "It may be true that when a project is extended (not suspended), the work will be ongoing and thus income from the project will continue to be applied to home office overhead costs. On the other hand, when work is extended, the project income will be spread over a longer period of time and consequently, less of the income will be allocated to home office overhead costs. Thus, an extended project—like a suspended project—may result in reduced income vis-a-vis overhead costs."

³²⁹ *Interstate Gen. Gov't. Contractors, Inc., v. West*, 12 F.3d 1053 (Fed. Cir. 1993) (The CAFC noted that proper application of the standby test focuses on the delay of contract performance for an uncertain duration during which the contractor is required to remain ready to perform. The CAFC also stated that there is no requirement that a contractor be suspended before it is entitled to recover under Eichleay).

³³⁰ *Craft Mach. Works, Inc.*, ASBCA No. 47227 (Nov. 26, 1996); *Mech-Con Corp. v. West*, 61 F.3d 883 (Fed Cir. 1995).

³³¹ *Sippial Electric & Construction Company, Inc. v. Widnall*, 69 F.3d 555 (Fed. Cir. 1995) (This held that a contractor which establishes that the government forced it to

for a contractor to take on other work or reduce overhead when he is required to stand by during an uncertain period of government imposed delay. The Eichleay formula may not be appropriate when a definitive date for the resumption of work is known from the beginning, and the contractor is able to take on additional work. In that case, the contractor is expected to reallocate his forces and take on the additional work.³³² In addition, a contractor is not entitled to recover under the Eichleay formula if his performance is not suspended, delayed, or disrupted but is merely extended as a result of extra or additional work. In that case, the additional overhead should be absorbed by the additional work.³³³ Use of the Eichleay formula without first determining whether additional overhead costs are in fact incurred, or an underabsorption³³⁴ is actually involved, can result in compensating the contractor when no injury has resulted.

Claims for unabsorbed overhead are to be expected following a shutdown. Some contractor costs legitimately continue despite the fact that a contractor may have stopped working. When presented a claim for unabsorbed overhead, the government must consider all the circumstances (to include which costs should have been mitigated³³⁵) to determine the appropriate relief.

remain on standby, and the government delay was uncertain, establishes a prima facie case of entitlement to Eichleay damages. The burden then shifts to the government to establish, if it can, that the contractor was not harmed by the delay).

³³² Jackson Elec. Co., ENGBCA 6238, 96-2 BCA ¶ 28431.

³³³ Community Heating & Plumbing Co. v. Kelso, 987 F.2d 1575 (Fed. Cir 1993).

³³⁴ Dawson Constr. Co., GSBCA 4956, 79-2 BCA ¶ 13,989 (Normally a short delay that is overcome within a single accounting period would not result in an underabsorption).

³³⁵ Kemmons-Wilson, Inc., ASBCA 16167, 72-2 BCA ¶ 9689.

B. Loss of Efficiency

A contractor may recover for loss of efficiency if he can establish both that the loss of efficiency resulted in increased costs and that the loss was caused by factors for which the government was responsible.³³⁶ Loss of efficiency has been recognized as resulting from various factors causing lower than expected productivity.³³⁷ Accordingly, if a contract is delayed, due to government action, a contractor may recover the increased costs of performing work during later periods when weather, or other factors, make the work more difficult or expensive.³³⁸ Obviously the contractor must be able to prove that the government was responsible for the loss of efficiency.³³⁹ One of the most common techniques used in estimating loss of efficiency is to compare the period when loss of efficiency occurred with a period during which normal efficiency was experienced.³⁴⁰ The only time loss of efficiency may possibly come into play would be following an extremely long shutdown, which significantly delays a contractor's performance or causes a contractor's work force to be lost following a furlough.

³³⁶ *Luria Bro. & Co. v. United States*, 117 Ct. Cl. 676, 369 F.2d 701 (1966).

³³⁷ *Youngdale & Sons Constr. Co. v. United States*, 27 Fed. Cl. 516 (1993) (Disruption of contractor's work sequence); *International Aircraft Servs., Inc.*, ASBCA 8389, 65-1 BCA ¶ 4793 (Disruptions and numerous work stoppages); *Warwick Constr., Inc.*, GSBCE 5070, 82-2 BCA ¶ 16,091 (Being required to work under less favorable weather conditions).

³³⁸ *Charles G. Williams Constr., Inc.*, ASBCA No. 42592, 92-1 BCA ¶ 24,635.

³³⁹ *Thomas E. Shea, Proving Productivity Losses in Government Contracts*, 18 Pub. Cont. L. J. 414 (Mar 1989); *Gulf Contracting, Inc.*, ASBCA 30195, 89-2 BCA ¶ 21,812.

³⁴⁰ *International Terminal Operating Co.*, ASBCA 18118, 75-2 BCA P 11,470.

C. Materials

If a delay occurred during the time a contractor was awaiting government approval of materials, and the price of the material increases during the delay period, the contractor may have a legitimate claim for passing the subsequent increase in cost along to the government.³⁴¹ Likewise, a contractor may legitimately claim storage costs for materials or products that were to be delivered but, due to a shutdown and the lack of government personnel to receive the product, could not be delivered. The contractor may also recover for delay costs associated with waiting for a government inspection which is unreasonably delayed.³⁴²

D. Changes in Vendors

During a lengthy shutdown it is possible that a contractor may lose his supplier. As a result he may be forced to purchase materials from another source, possibly at a higher price. Typically contractor's will not be allowed to recover against the government for consequential damages.³⁴³ To the extent that this cost differential, as a result of the shutdown, was foreseeable and the natural and probable consequence of the government's actions, the subsequent increase in cost could legitimately be passed on to the government.³⁴⁴ This same analysis would be used

³⁴¹ Berkeley Constr. Co., VABCA 1962, 88-1 BCA ¶ 20,259 (1988) (Here the contract was delayed 1462 days. The Board calculated the labor and material escalation that had occurred over the total contract delay and assessed the government its pro rata share for the 813 days for which it was found responsible).

³⁴² Toombs & Co., ASBCA 34590, 91-1 BCA P 23,403 (Where the government did not begin inspection until 23 days after notice, as opposed to the 20-day period that it was entitled to).

³⁴³ Myerle v. United States, 33 Ct. Cl. 1 (1897).

³⁴⁴ Land Movers, Inc., ENGBCA 5656, 91-1 BCA P 23,317.

to likely deny a claim for lost business opportunities³⁴⁵ or travel incurred in connection with a shutdown. If it is too remote, it will be denied as consequential damage.³⁴⁶

E. Idle Equipment

Costs resulting from idle equipment, used exclusively on a government project that could not be used elsewhere, and for which costs cannot be mitigated (such as where continued rental is more appropriate and cost effective than return and re-rental), are recoverable.³⁴⁷ For contractor owned equipment compensation is either actual cost³⁴⁸ or at rates derived from equipment rate manuals made a part of the contract.³⁴⁹ It is common practice to reduce the rates called for in the rate manuals by one-half when computing the cost of contractor-owned idle equipment during periods of delay.³⁵⁰ Recovery will typically be denied unless the contractor demonstrates that its equipment was employed, or could have been employed, on another contract but was instead reasonably or necessarily set aside for performance on the suspended contract.³⁵¹ Use

³⁴⁵ Nevada Skylines, Inc., AGBCA 92-167-1, 92-3 BCA ¶ 25,089.

³⁴⁶ Tele-Sentry Sec., Inc. v. General Servs. Admin., GSBCA 8950, 92-3 BCA P 25,088.

³⁴⁷ *Supra* note 311.

³⁴⁸ C.L. Fairley Constr. Co., ASBCA 32581, 90-2 BCA ¶ 22,665, *recons. denied*, 90-3 BCA P 23,005 (Actual costs are the preferred method of calculating these costs).

³⁴⁹ FAR § 31.105 (d)(2).

³⁵⁰ Tom Shaw, Inc., DOTBCA 2106, 90-1 BCA 22,580 (Here the Board used this technique even though the equipment was fully depreciated) (The FAR is silent on this 50% calculation, however, DAR 15-402.1 (c) specifically provided for reduction of the rates for idle equipment stating, "In periods of suspension of work for the convenience of the government under an appropriate contract clause, the allowance for equipment ownership expense shall not exceed 50% of the amount computed as herein indicated..")

³⁵¹ J.D. Shotwell Co., ASBCA No. 8961, 65-2 BCA ¶ 5243.

on another contract is only one indication that the equipment possessed an economic value beyond the suspended contract. If the equipment must standby for use on the suspended government contract, and the circumstances prevent its use on another contract, the contractor can recover standby costs.³⁵² Where the contractor rents equipment from others, the full rental payment is recovered if the contractor is unable to mitigate by using the equipment elsewhere.³⁵³

³⁵² Dillon Constr. Inc., ENGBCA No. PCC-101, 96-1 BCA ¶ 28,113 (In this case the equipment was easily transportable and movable on short notice, but because of the short duration of the anticipated suspension, it could not reasonably be moved and then be ready for contract performance).

³⁵³ Isaac Degenaars Co., ASBCA 11045, 72-2 BCA P9764; Folk Constr. Co. v. United States, 2 Cl. Ct. 681 (1983).

Chapter XI. Deadlines and Appeals

The government must treat all offerors fairly and consistently and follow applicable laws and regulations.³⁵⁴ Regulations generally have the force and effect of law when they are properly promulgated and published.³⁵⁵ This is particularly true during a shutdown situation when normal contract formation and administration activities may be disrupted. However, government officials do not have the authority to waive statutory requirements in the absence of a specific statutory provision granting such authority.³⁵⁶

A. Deadlines For Submission of Bids or Proposals

In *Family Stress Clinics of America*,³⁵⁷ the Department of Health and Human Services (HHS) issued a request for proposals (RFP) for award of a cost-plus-award-fee contract for counseling services. The RFP had a closing date of December 29, 1995. Because of the government shutdown, HHS was effectively closed from December 18, 1995 through January 5, 1996. Snow emergencies further interrupted normal operations until January 16, 1996. Realizing that a shutdown may have had a negative effect on the government's ability to process offers, and the offeror's ability to submit proposals, the

³⁵⁴ *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979).

³⁵⁵ *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947).

³⁵⁶ *M-R-S Mfg. Co. v. United States*, 203 Ct. Cl. 551, 492 F.2d 835 (1974) (Here the requirements of the Truth in Negotiations Act were not waivable by the contracting officer).

³⁵⁷ *Matter of Family Stress Clinics of America*, B-270993, May 10, 1996, 96-1 CPD 223.

Contracting Officer directed a technical support contractor to call all 125 firms on the mailing list and inform them that the closing date would be extended indefinitely.

Written confirmation, including a new closing date, was to follow. For some unexplained reason, HHS never issued a written confirmation and, in fact, did not extend the closing date. HHS received 6 proposals and sought to make an award.

Family Stress Clinics, relying on the oral amendment, had not submitted a proposal but instead repeatedly tried to contact the contracting officer for clarification. Family Stress Clinic protested, arguing that the oral amendment was effective. HHS argued the oral amendment could not be effective because there was no written confirmation as required by regulation (FAR § 15.410(b)). GAO disagreed and required the agency to honor its oral amendment despite the fact that a written amendment was never issued. They found that the protester's actions were reasonable in light of the circumstances, and that the agency should be required to honor its oral amendment. HHS was required to reopen the competition and issue an amendment establishing a new closing date. Based on the circumstances, the GAO waived regulatory requirements to prevent an inequity. As noted above, courts and administrative boards may not waive statutory time/filing requirements without specific authority.

B. Deadline for Processing Appeals

When procedures used to administer a contract do not comply with statute or regulation, the government may be required to follow the mandatory procedures. In *Moran Bros., Inc., v. United States*, 171 Ct. Cl. 245, 346 F.2d 590 (1965) a particular

procurement regulation permitted appeals to be filed within 60 days of a certain event. The government wrote its contract to allow only 30 days. The Court agreed with the contractor that the government was bound to follow this regulation. The contractor's appeal was found to be timely, even though it exceeded the 30 day limit included in the contract. In *Cadell Construction Company*, the shutdown affected the processing of a contract disputes act appeal.³⁵⁸ The appellant moved for summary judgment because DOJ, failed to supply a Rule 4 file within the required 30 days of the notice of appeal. The agency attributed the delay to the shutdown and the resulting government-wide furlough. Although the contracting officer was not furloughed, the attorneys assigned to defend against the appeal were. Hence, the contracting officer could not obtain legal counsel as he was preparing the Rule 4 file. The Board noted several unpublished orders in which it had afforded parties to other unrelated appeals latitude in satisfying filing obligations under the Board rules. Thus, given the severity of a summary dismissal, and the fact that this was the agency's "first offense," the Board denied the appellant's motion.³⁵⁹ The Board recognized that the shutdown created an unusual situation and burden on the agency. This case reaffirms that regulatory provisions may be waived by the Boards to avoid inequities. Here a party that could have been harmed by the fiscal year 1996 shutdown acted reasonably to comply with regulations. The Board bent the rules to accommodate their reasonable request.

³⁵⁸ DOT BCA No. 2967, 96-1 BCA ¶ 28,235.

³⁵⁹ *Id.* at 140,988 (The board also observed, however, that it "expects, as a courtesy if not an obligation, that any motion to extend to the due date will be filed sufficiently

C. Claims

Many contractors were required to stop work or incurred increased costs as a result of the fiscal year 1996 shutdown. As noted earlier, virtually every contractor that worked for EPA was directed to stop work.³⁶⁰ As expected, almost every contractor that was issued a stop work order by EPA filed a claim. A large number of the claims were immediately settled.³⁶¹ Contracting Officer final decisions have been issued for only a few cases.³⁶² These may yet find their way to a Board or Court. At present there are no cases pending before the Armed Services Board of Contract Appeals with any issues relating to the fiscal year 1996 shutdown.³⁶³ If contract performance was delayed due to the shutdown, and a contractor was not satisfied with the government's attempts to correct the wrong, no such case has yet made it to any Administrative Board.³⁶⁴ In addition, Judge Dicus is unaware of any related court cases.

before that date arrives to afford counsel an opportunity to timely perfect the filing if the motion to extend is denied").

³⁶⁰ Interview with Edward Murphy, Chief Procurement Policy Branch, EPA, Washington D.C. (May 1996).

³⁶¹ *Id.*

³⁶² *Id.*

³⁶³ Interview with Judge Carroll Dicus, Armed Services Board of Contract Appeals, (Mar. 1997).

³⁶⁴ *Id.*

Chapter XII. Proposed Legislation

Throughout the fiscal year 1996 shutdowns many members of Congress expressed sympathy for the furloughed federal employees, the public in general, and government contractors.³⁶⁵ Constance A. Morella (R-MD) echoed the sentiments of many of her colleagues when she said, referring to the shutdowns, "We should not have the people's confidence in government eroded and federal employees and the private sector victimized."³⁶⁶ While many legislative proposals have sought to mitigate the impact of future shutdowns, none have received the support necessary to ensure passage.

Some of the early bills sought to provide security for government employees during a shutdown by ensuring that their pay would be protected and guaranteed like that of Congress and the President.³⁶⁷ If employees are not paid because of a funding gap, then

³⁶⁵ On January 18, 1996, nine members of Congress wrote a letter to Office of Management and Budget Director Alice M. Rivlin and Office of Personnel Management Director James B. King, expressing concern about arbitrary and inconsistent treatment of contractor employees during the shutdown. The letter points out that "thousands of federal contract employees" were unpaid during the shutdown and "are facing financial ruin." The letter urged that contractors and their employees affected by the shutdown be treated fairly and consistently, even though the administration may not be able to fully compensate them. The letter was signed by Senator John Warner (R-Va.) and Representatives Tom Davis (R-Va.), Constance Morella (R-Md.), James Moran (D-Va.), Herbert Bateman (R-Va.), Albert Wynn (D-Md.), Frank Wolf (R-Va.), Steny Hoyer (D-Md.), and Wayne Gilchrest (R-Md.).

³⁶⁶ Paul Duggan, *Stalemate Leaves Tourist Shutout, Workers Worried*, Wash. Post, Dec 17, 1995.

³⁶⁷ H.R. 2007, 104th Cong., 2d Sess. (1996); H.R. 2273, 104th Cong., 2d Sess. (1996); H.R. 2662, 104th Cong., 2d Sess. (1996); H.R. 2671, 104th Cong., 2d Sess. (1996); S. 1428, 104th Cong., 2d Sess. (1996); S. 1480, 104th Cong., 2d Sess. (1996); S. 1482, 104th

Congress members and the President would not be paid either. Another bill, introduced by Senator Barbara Mikulski, S. 396, requires the government to pay civilian federal employees and military members who are furloughed during a government shutdown. One bill, submitted by Joe Barton (R-Texas), called for a change to the law that prohibits federal employees from volunteering their services during a shutdown.³⁶⁸

Some bills called for far reaching relief for government contractors. The bill, introduced by Representative Patsy Mink (D-Hawaii), H.R. 2857, called for reimbursement of federal employees, federal contractors, and employees of federal contractors for "financial harm" resulting from delayed payments, or the inability of the contractor to perform, due to a government shutdown. "Financial harm" was broadly defined as interest accrued on debts, penalties incurred for late payments of bills, and any other incurred monetary loss. It failed to gain any support, and was allowed to die. Representative Carrie P. Meek (R-Florida) introduced the "Keep the Government Open Act of 1996."³⁶⁹ This bill, citing the thousands of furloughed workers and potential financial harm to federal contractors, sought to amend the anti-deficiency act to allow federal employees to continue to work, and be paid, during a lapse in appropriations if the President determined that an adequate appropriation was likely to be enacted before the end of the fiscal year. No hearings were ever scheduled for this bill either, virtually ensuring that it died.

Cong., 2d Sess. (1996); S. 1508, 104th Cong., 2d Sess. (1996); H.R. 2828, 104th Cong., 2d Sess. (1996); and H.R. 2855, 104th Cong., 2d Sess. (1996).

³⁶⁸ Stephen Barr, *Government Shutdown*, Wash. Post, Dec. 22, 1995.

³⁶⁹ H.R. 2963, 104th Cong., 2nd Sess. (1996).

A number of bills proposed an automatic continuing resolution that would go into effect if Congress failed to enact an appropriation by the end of the fiscal year, September 30.³⁷⁰ Senator John McCain (R-Arizona) introduced S. 228 as the Government Shutdown Prevention Act of 1997. It sought to prevent a government shutdown by amending title 31, U.S.C, to provide for a permanent continuing resolution which would be triggered if any annual agency spending bills were not enacted by the end of the fiscal year. This bill set the temporary funding level at the lowest of one of the five following levels: (1) the previous year's appropriation level; (2) the House passed appropriations bill for the budget year; (3) the Senate passed appropriations bill for the budget year; (4) the President's budget request; or (5) any levels established by an independent continuing resolution subsequent to this act's passage. A similar bill (H.R. 638), submitted to the House of Representatives by Rep. George Gekas (R-Pennsylvania), called for agency funding at 75% of the lowest of the same five spending levels. A subsequent bill, called the No-Shutdown Bill (S. 547), also introduced by Senator McCain, recently passed the House and Senate as part of a flood disaster relief bill. The No-Shutdown portion of the bill established an automatic "safety-net" funding mechanism that would be triggered if regular appropriations bills for fiscal year 1998 were not signed into law by October 1, 1997, and authorized continued funding at 100% of fiscal year 1997 levels. The bill was sent to the President on June 9, 1997 and promptly vetoed. Back at the Senate, the No-Shutdown portion of the bill was removed

³⁷⁰ H.R. 2965, 104th Cong., 2nd Sess., 142 Cong. Rec. H1241 (1996).

and the Disaster Relief bill and once again sent to the President. This time it was immediately signed into law on June 12, 1997.³⁷¹

How much of what has been said, and proposed, is political grandstanding for the benefit of constituents back home, or conversely, represents serious legislative attempts to change the government, can not be determined. However, much of what has been proposed has failed to gain the degree of support necessary to bring about any change. Some suggest that the terms and conditions of contracts differ so dramatically that members of Congress are reluctant to pass a "one size fits all" solution.³⁷² Others feel that legislation that would create an automatic continuing resolution would only add to the problem by eliminating the pressure to pass appropriations in the first place. Whatever the case, it is clear that there will be no simple legislative answer. Agencies and contractors will continue to have to deal with the inconvenience and uncertainties that accompany a lapse in appropriations.

With no imminent legislative solution, contractors can expect that the government will be forced to continue to decide on a case by case basis if, and how much, each contractor should be reimbursed for claims related to a government shutdown.

³⁷¹ Christy Harris, *Shutdown Measure Cut From Disaster Bill*, Federal Times, June 23, 1997 at 2.

³⁷² Bill Murray, *Vendors Face Furlough Alone*, Wash. Technology, Feb. 8, 1996 at 1.

Chapter XIII. Conclusion

While disputes over funding constitute a regular part of the nation's political activity, they seldom result in a funding gap as extensive and pervasive as that experienced during fiscal year 1996. The shutdowns presented the government with an interesting challenge. It was forced to balance its actions between the need to continue to carry on its basic functions and at the same time comply with constitutional and financial restrictions. While all parties expect the major functions of the government to continue despite a shutdown, there remains a lot of uncertainty.³⁷³

The cost of a shutdown, to the government and its contractors (in terms of lost wages, lost productivity, and contractor claims), can be enormous. The shutdown of fiscal year 1996 was estimated to have cost the government billions.³⁷⁴ This concluding chapter will provide a summary, drawn from the previous chapters, as to the effect of a shutdown on government contracts.

The appropriation process places specific limits on how the government conducts its financial matters. When an appropriations bill fails to pass, congress must either enact a continuing resolution to continue to fund affected agencies, or those agencies will experience a funding gap. During such a gap, the government must make decisions as to what amount of appropriation, if any, might become available later and adopt a cost minimization strategy. The Anti-Deficiency Act, if taken literally, appears to require

³⁷³ Feld, Alan L., Shutting Down the Government, 69 B. U. L. Rev. 971, (1989).

the government to incur no additional expenses during a shutdown.³⁷⁵ This however, would result in significant risks of loss to existing government investments and serious disruptions of government service. Despite fairly clear direction from the United States Attorney General that funding gaps required the government to seriously consider shutting down,³⁷⁶ the government has historically followed a different path (almost to the point of ignoring the fact that a funding gap has occurred). This, in part, due to a perception that congress could not have intended that the government actually shut down.³⁷⁷ The government incurred expenses as needed to minimize total cost to the government while assuming that the functions of the government would continue at approximately their present level. This strategy resulted in least total government cost, and produced the minimum disruption of services. However, the unprecedented scope and duration of the fiscal year 96 shutdown forced some agencies to implement aggressive shutdown measures.

Guidance concerning appropriate government activity has come from standard practice over the years, but is primarily found in Attorney General opinions.³⁷⁸ This direction confirms that various services may be curtailed during a shutdown, but the

³⁷⁴ *Supra* note 9

³⁷⁵ See text beginning at footnote 90.

³⁷⁶ *Supra* note 116.

³⁷⁷ *Supra* note 144 (Senator Magnuson).

³⁷⁸ See text beginning at footnote 152.

government can legitimately continue many essential functions.³⁷⁹ In fact, the government does not actually “shutdown.” Every agency will not be affected the same. Some areas of government spending remain totally unaffected by a funding lapse.³⁸⁰ During the fiscal year 1996 shutdown, those agencies whose appropriations had been approved were merely inconvenienced, while others agencies were forced to deal with more drastic shutdown possibilities. The length of a shutdown, and the government’s understanding of how it is to be implemented, will affect the shutdown’s impact on government contractors. Activities whose funds are not dependent on enactment of annual appropriations may continue to award contracts and function under already awarded contracts. This is true of activities funded by multi-year appropriations and indefinite appropriations.³⁸¹ As a shutdown continues, prior year funds will be depleted. Affected agencies may be forced prioritize which operations they wish to continue. Obviously, a shutdown does not occur in a vacuum. Numerous government contracts will be affected as agencies take steps to bring their own conduct into what they perceived to be compliance with government guidelines

³⁷⁹ *Delinger Opinion supra* note 157 (The government may continue to fund sources not requiring enactment of a new appropriations and continue functions under any already awarded contracts, continue obligations expressly authorized by law, continue obligations necessarily implied by law, continue the President’s core constitutional duties, and may carry on emergency functions related to the safety of human life or the protection of property).

³⁸⁰ *Id.*

³⁸¹ See text beginning at footnote 144.

The OMB has the responsibility of issuing instructions to agencies concerning implementation of a shutdown.³⁸² This also includes the responsibility to give direction concerning identification of “essential” personnel and functions, and the furlough of “non-essential” personnel. During the fiscal year 1996 shutdown, all agencies were required to identify essential personnel to carry on the vital functions of the government. These functions were to continue through out the shutdown. Guidelines, defining essential functions and personnel, were very general.³⁸³ This directly led to their inconsistent interpretation and application.

Following this direction DoD developed and, when instructed, implemented their contingency plan to have “non-exempt” activities cease and “non-exempt” employees furloughed.³⁸⁴ This exercise identified inconsistencies in how agencies treated similar problems and inconsistencies in how contractors were treated. For example, some agency employees were determined to be “essential,” while other agencies chose to classify some individuals, with the same skills as the first group, as “non-essential.” Likewise, some agencies determined that the shutdown required them to issue formal stop-work orders to all their contractors (even those who were not dependent upon approval of the appropriations bill for their funding) while others took no action at all, or varied their instructions to contractors on a case by case basis. In still other cases,

³⁸² *Supra* note 180.

³⁸³ See text beginning at footnote 177.

³⁸⁴ *Supra* note 191.

contractor payments and government inspections were delayed due to the lack of government personnel.

The next chapter considered when a shutdown may be viewed as a sovereign act. This could have significance in that a contractor could be denied all recovery if a shutdown is determined to be a sovereign act.³⁸⁵ In the past, some actions by the government have caused what otherwise may have been a sovereign act, to be viewed as a contractual act. Thus providing an avenue of recovery for the contractor. However, the author knows of no attempt by the government to limit or reduce any claim relating to the fiscal year 1996 shutdown by asserting that the shutdowns were a sovereign act.

Due to the shutdown, government contractor activity was sometimes scaled back, in some cases reducing, delaying, disrupting, and completely eliminating contractor work load. The contractor's right to be made whole under the various FAR clauses, dealing with adjustments and equitable adjustments, was reviewed next.³⁸⁶ It is clear that every clause has its unique twist. The circumstances of each event must be viewed in light of the specific applicable clause to determine whether it affords the contractor any relief.

The particular type of contract will affect whether the government may continue its operation during a funding gap. This is directly related to the funding associated with each type of contract and the timing of the funding. As noted earlier,³⁸⁷ the government

³⁸⁵ See text beginning at footnote 207.

³⁸⁶ See text beginning at footnote 225.

³⁸⁷ *Delinger Opinion supra* note 157.

may continue to fund sources not requiring enactment of a new appropriation and continue functions under any already awarded contracts.

Contractor labor costs and other costs were considered next. The contractor may be able to recover a variety of costs related to the shutdown. Specific costs to include claims for contractor labor costs, increases in material costs, costs associated with a change in vendors, related travel costs, idle equipment, and unabsorbed overhead costs were discussed.³⁸⁸ The circumstance surrounding each incident must be carefully reviewed to determine the extent of a contractor's recovery.

The effect of a shutdown on deadlines and appeals was considered. A shutdown does not give the government unfettered discretion to do what ever it likes.³⁸⁹ In the matters reviewed, the Board did not penalize a party who, despite his best efforts, was unable to comply with a regulatory deadline because of the shutdown. The government must reasonably stand by its word with regard to instructions for submission of bids and proposals. If a shutdown makes it impossible to meet a regulatory deadline, the board will look to see whether the contractor's conduct was reasonable under the circumstances. If so, it is likely that he will be granted relief. The Board will do all it can to not perpetuate an inequity when the injured party acted reasonably.

As part of this thesis the author contacted the ASBCA and found that there are no cases pending before that Board with any issues relating to the fiscal year 1996 shutdown. In my opinion, many of the claims filed by the various contractors alleged

³⁸⁸ See text beginning at footnote 317.

³⁸⁹ See text beginning at footnote 354.

financial harm. Where practical, the government did all it could to pay reasonable claims to avoid unnecessary litigation. It is possible that some cases may have not yet matured and will appear before either a Board or Court. As stated earlier, there presently are no such cases.

A flurry of legislation, dealing with the shutdown of fiscal year 1996, was proposed immediately following the shutdown. Many of the bills sought to mitigate the impact of future shutdowns by guaranteeing federal employee pay, or proposing automatic continuing resolutions.³⁹⁰ In addition some bills proposed to guarantee pay for furloughed contractor employees, and reimburse them for all "financial harm." Despite these proposals, there has been very little real support for change. Recently, a No-Shutdown provision was attached to a Mid-West Flood Disaster Relief Bill. The Bill made it through the House and Senate, only to be vetoed by the President. The Disaster Relief Bill was resubmitted without the No-Shutdown provision and was immediately signed into law.³⁹¹ There is no way to judge whether what has been proposed was intended as serious legislation, or was simply proposed as political grandstanding for the benefits of constituents back home. However, it is clear that to date no legislation, dealing with shutdown related issues, has the degree of support necessary to bring about any real change. Accordingly, government agencies will have to continue to decide, on a case by case basis, the extent of contractor recovery following a government shutdown.

³⁹⁰ See text beginning at footnote 365.

³⁹¹ Jackie Frank, *Clinton Signs Disaster Aid Bill*, Reuters LTD., Jun. 13, 1997.

It is likely that government shutdowns will continue to occur. Despite all the media attention they attract, shutdowns have had little real effect on the government or its contractors. Government contractors, like the rest of the country, must simply ride out the occasional financial storm that represents our appropriations process. The government will ensure that essential functions and services continue. Contractors harmed by a shutdown may file a claim with the government, and are often successful in obtaining some relief. There is precedent for recovery of much of the cost associated with a shutdown. Each shutdown will present unique circumstances that could affect an individual contractors claim. However, the government has an interest in seeing that their contractors are afforded some relief. Accordingly, government shutdowns will continue to have little lasting effect on government contractors.

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